(13)

o. 83-1013-CFX Title: Chemical Manufacturers Association, et al.,
tatus: GRANTED Petitioners
v.
Natural Resources Defense Council, Inc., et al.
ocketed:
ecember 19, 1983 Court: United States Court of Appeals
for the Third Circuit
ide:
83-1373 Counsel for petitioner: Garrett, Theodore L.

Counsel for respondent: Solicitor General, Dubrowski, Frances

ntry	Date	Note	Proceedings and Orders
1	Dec 19 1983	G	Petition for writ of certiorari filed.
3	Jan 12 1984		Order extending time to file response to petition until March 19, 1984.
6	Mar 7 1984		Order further extending time to file response to petition until April 2, 1984.
7	Apr 2 1984		Brief of respondent NRDC in opposition filed. VIDED.
8	Apr 2 1984	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
9	Apr 4 1984		DISTRIBUTED. April 20, 1984
11	Apr 13 1984	X	Reply brief of petitioners Chemical Mfr. Assn., et al. filed.
13	Apr 23 1984		REDISTRIBUTED. April 27, 1984
15	Apr 30 1984		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
16	Apr 30 1984		Petition GRANTED. The case is consolicated with 83-1373, and a total of one hour is allotted for oral argument.
17	May 30 1984	G	Motion of the parties to disperse with printing the joint appendix filed.
18	Jun 11 1984		Motion of the parties to dispense with printing the joint appendix GRANTED.
20	Jun 11 1984		Order extending time to file brief of petitioner on the merits until July 6, 1984.
21	Jul 6 1984		Brief of petitioner EPA filed. VIDED.
22	Jul 6 1984		Brief of petitioners Chemical Mfr. Assn., et al. filed.
23	Jul 6 1984	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
24	Jul 13 1984		Record filed.
25	Jul 13 1984		Certified appendix and partial proceedings received.
26	Jul 13 1984		Certified appendix and partial proceedings received..
28	Jul 27 1984		Order extending time to file brief of respondent on the merits until August 20, 1984.
29	Aug 9 1984		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
30	Aug 20 1984		Brief amicus curiae of New York filed. VIDED.
31	Aug 20 1984		Brief of respondent NRDC filed. VIDED.
32	Aug 21 1984		CIRCULATED.
33	Aug 20 1984	G	Motion of Southeastern Fisheries Association, Inc. for leave to file a brief as amicus curiae filed.
34	Aug 28 1984		SIT FOR ARGUMENT. Tuesday, November 6, 1984. This case is consolidated with No. 83-1373. (3rd case) (1 hour)

No. 83-1013-CFX

Entry	Date	Note	Proceedings and Orders
35	Oct 1 1984		Motion of Southeastern Fisheries Association, Inc. for leave to file a brief as amicus curiae GRANTED.
36	Oct 25 1984	X	Reply brief of petitioners Chemical Mfr. Assn., et al. filed.
37	Oct 29 1984	X	Reply brief of petitioner EPA filed. VIDED.
38	Nov 6 1984		ARGUED.

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FILED
DEC 19 1983
ALEXANDER L. STEVAS,
CLERK

83-1013

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION,
AMERICAN CYANAMID COMPANY,
FMC CORPORATION, and
UNION CARBIDE CORPORATION,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., and
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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December 1983

QUESTIONS PRESENTED

The decision below raises important questions concerning EPA's development of technology-based effluent limitations guidelines and pretreatment standards under the Clean Water Act. Since the beginning of this program under the 1972 Act, the Agency has established such limitations and standards for industry categories in national regulations based on a consideration of typical plants. EPA has deferred to subsequent "variance" proceedings the consideration of atypical plants presenting factors not previously considered by the Agency in the industry regulations. The court below struck down EPA's variance procedure, holding that such variances may not be issued for toxic pollutants. The questions presented are:

1. Whether the decision of the court of appeals is contrary to this Court's holding in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 128 (1977) that effluent limitations may be "set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause" in its regulations.

2. Whether the court below was incorrect in ruling that § 301(1) of the Clean Water Act precludes the granting of a variance for toxic pollutants to atypical plants that can demonstrate a factor not considered by EPA in establishing national technology-based regulations.

3. Whether the decision below, by removing EPA's discretion to deal with atypical situations either by individual orders or by rulemaking, is contrary to this Court's decision in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

PARTIES

The parties to this action are as follows:[1]

Chemical Manufacturers Association, American Cyanamid Company, FMC Corporation, Union Carbide Corporation;

Natural Resources Defense Council, Inc.; and

U.S. Environmental Protection Agency.

The Natural Resources Defense Council, Inc. ("NRDC") was the petitioner below. The U S. Environmental Protection Agency ("EPA") was the respondent. The Chemical Manufacturers Association, *et al.*, were intervenor-respondents below.[2]

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, the parent companies, subsidiaries and affiliates of each corporate party to this petition are set forth in the Appendix at A-111.

[2] The above list includes all parties to the separately-briefed case numbers 81-1977 and 81-1985 below. The decision below also ruled on related petitions filed by other parties which do not involve the questions presented here. The parties to these related cases below are as follows:

National Association of Metal Finishers, Electroplaters of York, Inc., Pioneer Metal Finishing, Inc., The Institute for Interconnecting and Packaging Electronic Circuits, Ford Motor Company, Inc., United States Brewers Association, American Paper Institute, National Forest Products Association, Synthetic Organic Chemical Manufacturers Association, Air Products and Chemicals, Inc., Hercules Incorporated, Shell Oil Company, Association of Metropolitan Sewerage Agencies, Metal Finishing Association of Southern California, Interlake, Inc., Republic Steel Corporation, United States Steel Corporation, American Iron & Steel Institute, Rouge Steel Co., Chicago Association of Commerce and Industry, Illinois Manufacturers Association, and Mid-America Legal Foundation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

CHEMICAL MANUFACTURERS ASSOCIATION,
AMERICAN CYANAMID COMPANY,
FMC CORPORATION, and
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Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., and
U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Chemical Manufacturers Association, *et al.*, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit in this case.[1]

[1] The Solicitor General, on behalf of EPA, has requested an extension of time until February 17, 1984, within which to file a petition for a writ of certiorari in this case. *See* Appx. at A-128. The Court may wish to defer acting on this petition until the government files a petition for a writ of certiorari (or advises the Court that it has decided not to file a petition) so that the Court will have before it all relevant materials.

OPINION BELOW

The opinion of the court of appeals below is reported at 719 F.2d 624, and is reprinted in the Appendix to this petition at A-1.

JURISDICTION

The order of the court of appeals was entered on September 20, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C § 1254(1) (1976).

STATUTES AND REGULATIONS INVOLVED

This case involves technology-based "pretreatment standards" under Section 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b) (1976 & Supp. V 1981). Section 301(b) of the Act, 33 U.S.C. § 1311(b) (1976 & Supp. V 1981), describes various effluent limitations and standards that are to be achieved. Section 301(1) of the Act provides that the Administrator may not modify the requirements of § 301 for toxic pollutants. The factors to be considered in establishing effluent limitations are set forth in § 304(b) of the Act, 33 U.S.C. § 1314(b) (1976 & Supp. V 1981). Sections 301(b), 301(1), 304(b) and 307(b) of the Act are set forth in the Appendix at A-116-21.

EPA's regulations govering the establishment of "fundamentally different factors" ("FDF") variances from pretreatment standards are codified at 40 C.F.R. § 403.13 (1983), and are set forth in the Appendix at A-122.

STATEMENT OF THE CASE

Under the Clean Water Act, EPA is directed to promulgate technology-based effluent limitations guidelines and standards applicable to the various major segments of American industry. Because of the complexity of developing these limitations and standards, EPA has focused its rulemaking efforts on the more typical plants in an industry, and has deferred to subsequent individual "variance" proceedings the consideration of atypical plants. This has resulted in significant cost and time savings in the development of industry regulations.

This petition seeks review of a judgment of the Third Circuit which struck down EPA's deferred procedure for allowing so-called "variances" for "fundamentally different" dischargers of priority or toxic pollutants subject to pretreatment standards. Petitioners are seeking certiorari because the decision below upsets the long-standing way in which EPA has developed and applied technology-based regulations under the Clean Water Act. The decision below creates a conflict in the circuits, and is contrary to this Court's decision in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) ("*du Pont*").

A. Legislative And Administrative Background

A brief discussion of the Act's program of guidelines and standards provides the background of the proceedings below. Under the Clean Water Act, industrial direct dischargers must meet a series of technology-based effluent limitations and standards.[2] By July 1, 1977, industrial direct dischargers had to achieve effluent limitations based on the application of the "best practicable control technology currently available" ("BPT") as de-

[2] Industrial and commercial plants use water for various purposes in their operations and discharge wastewater. These discharges are made either directly to waters of the United States ("direct discharges") or to municipal sewer systems ("indirect discharges"). In the latter case, the discharges are collected and treated in a publicly owned treatment works ("POTW") before being discharged to waters of the United States.

fined by EPA. 33 U.S.C. § 1311(b)(1)(A) (1976). Such industrial direct dischargers must meet a second stage of limitations based upon the "best available technology economically achievable" ("BAT") by July 1, 1984. 33 U.S.C. § 1311(b)(2)(A) (1976 & Supp. V 1981). Industrial dischargers to publicly owned treatment works ("POTWs") are required to comply with pretreatment standards established under the Act for pollutants that are not susceptible to treatment by POTWs or would interfere with the operation of POTWs. 33 U.S.C. § 1317(b).

EPA has implemented the BPT, BAT and pretreatment provisions of the Act through a major rulemaking program to establish technology-based effluent limitations and standards for twenty-one major industries covering sixty-five priority or "toxic" pollutants or groups of pollutants. In this program, pretreatment standards are developed together with, and set at levels equivalent to, the BPT and BAT limitations for direct dischargers.[2]

Under the statute, EPA considers various technical and economic factors in establishing the technology-based regulations.[4] These include the age of equipment

[2] This strategy was the basis for settling suits by four environmental groups, and the resulting settlement agreement was approved in 1976. NRDC v. Train, 8 E.R.C. 2120 (D.D.C. 1976), *modified sub nom.* NRDC v. Costle, 12 E.R.C. 1833 (D.D.C. 1979), *modified sub nom.* NRDC v. Gorsuch (D.D.C. Oct. 26, 1982). In the 1977 amendments to the Clean Water Act, Congress sanctioned the Agency's approach to establishing effluent limitations and standards. *See* EDF v. Costle, 636 F.2d 1229, 1244 (D.C. Cir. 1980). The Act also authorizes EPA to establish standards for new sources, which are not involved here.

[4] Section 304(b) of the Clean Water Act specifies the factors for BPT and BAT limitations. 33 U.S.C. § 1314(b). EPA has considered these factors for pretreatment standards as well, relying on the NRDC consent decree and the legislative history of the Act. *See* text at n.3 above and n.20 below.

and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, energy impacts and the costs of control. In order to consider these factors in rulemaking for a particular industry, the Agency collects extensive data on dischargers that it expects will be subject to a set of standards.[5] Usually, EPA divides an industry category into subcategories to reflect differences among the plants revealed by the data. Different effluent limitations and pretreatment standards often will be set for each subcategory to reflect this diversity.[6]

EPA has recognized, however, that it is not always possible to collect and consider all pertinent data regarding every discharger, or even groups of dischargers, at the time nationwide effluent limitations and standards are promulgated. In some cases, data which may affect the regulations will not be available or will not be considered by the Agency during the development of the standards. The Agency has therefore recognized that it must have a procedure to take account of plants in a particular industry category that are significantly different from the plants EPA considered in developing the regulations for that category. The means that EPA has chosen to accommodate such atypical plants is the "fundamentally different factors" ("FDF") variance regulation. For direct dischargers, the FDF variance

[5] The data includes the pollutants discharged by an industry, the treatment technologies used or available for use, the treatability of pollutants, the processes used, and the economics of the industry.

[6] *See* du Pont, *supra*, 430 U.S. at 122.

clause is codified in EPA's NPDES permit regulations at 40 C.F.R. § 125.31 (1983); for indirect dischargers, it is contained in EPA's general pretreatment regulations, 40 C.F.R. § 403.13 (1983).[7]

Under the FDF variance regulation, any interested person may apply to EPA for an FDF variance with respect to a plant that is believed to be "fundamentally different." The issuance of a variance may result in discharge limits that are either more or less stringent than the limits for the industry category.[8] The plant that receives a variance from a BAT standard is not "exempt" from BAT, but will be given an individual BAT limit based on the statutory BAT factors.[9] A discharger must satisfy two key requirements to obtain an FDF variance. First, the discharger must show that it is fundamentally different from the other plants in the industry in ways corresponding to the statutory factors discussed above.[10]

[7] A copy of 40 C.F.R. § 403.13 appears in the Appendix at A-122.

[8] A member of the public may apply to EPA for a variance seeking the application of different, more stringent limits to a fundamentally different plant, or the plant may apply for a variance seeking different, less stringent limits. A variance request may also be initiated by EPA.

[9] *See* section III below. The term "variance" is somewhat of a misnomer since the revised plant limits are not an exception to the Act's requirements but rather an individualized application of those requirements.

[10] These factors are: the nature or quality of pollutants, the volume of the discharger's process wastewater, the nonwater quality environmental impact of control and treatment, the energy requirements of treatment technology, the age, size, land availability and configuration as they relate to the discharger's equipment or facilities, processes employed, process changes, engineering aspects of the application of the control technology, and the cost of compliance with required control technology. 40 C.F.R. § 403.13(d). *See* notes 3 and 4 above.

Second, the discharger must demonstrate that compliance with the industry standards would result in either a pollutant removal cost wholly out of proportion to the cost considered by EPA during development of the standards, or a non-water quality environmental impact fundamentally more adverse than the impact considered in developing the standards.[11]

The FDF variance procedure has proven to be an essential and limited "safety valve" in the effluent limitations and standards program. It has been relied upon by EPA in virtually every effluent limitation and standard regulation under §§ 301(b), 304(b) and 307(b) of the Act. The FDF procedure enables EPA to focus its attention in these regulations on the typical facilities in an industry and to defer consideration of atypical facilities.

B. The Proceedings Below

The general pretreatment regulations (including the FDF variance clause) were first promulgated on June 26, 1978. (43 *Fed. Reg.* 27736-773). Following further rulemaking on issues not involved here, EPA promulgated revised general pretreatment regulations on January 28, 1981. (46 *Fed. Reg.* 9404-60). A number of petitions seeking review of these regulations were considered together by the Third Circuit.[12]

In its suit, NRDC argued that EPA's allowance of a variance from pretreatment standards was unlawful on two grounds. The first and broader ground was that FDF variances from pretreatment standards are not specifical-

[11] 40 C.F.R. §§ 403.13(c)(2)(iv) and (c)(3)(ii) (1983).

[12] The courts of appeals have direct and exclusive jurisdiction to review pretreatment standards. 33 U.S.C. § 1369(b) (1976).

ly authorized by the Clean Water Act. Recognizing that this Court in *du Pont* construed the Act to require a variance procedure, NRDC argued that the Court's decision addressed BPT regulations and did not apply to BAT or pretreatment standards. NRDC's second argument was that variances for priority or toxic pollutants were contrary to § 301(1) of the Act, 33 U.S.C. § 1311(l), which provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list." Relying upon this Court's decision in *du Pont* and other cases, EPA argued that variances are necessary to address atypical plants presenting relevant factors not considered by the Agency. As to the second point, EPA argued that § 301(1) of the Act does not bar the granting of FDF variances for toxic pollutants, but refers to modifications specifically authorized by statute.[13]

The Third Circuit did not rule on NRDC's broader argument that FDF variances are unauthorized under the Act. However, the court below struck down EPA's FDF variance regulation, holding that § 301(1) of the Act prohibits variances for toxic pollutants. The court rejected EPA's distinction between FDF variances and modifications specifically authorized by the Act. In so doing, the court recognized that its decision conflicts with the decision of the Fourth Circuit in *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (4th Cir. 1980). The court also rejected EPA's argument that the principle of this Court's decision in *du Pont* authorizes FDF variances from pretreatment standards.[14]

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[13] *See* section III below.

[14] The opinion below also decided a number of other issues in related cases, which are not involved here.

It is difficult to overstate the impact of the Third Circuit's decision. It has undercut a major feature of the effluent limitations and standards program, which has been accepted and relied upon for years by EPA, regulated industries and the courts. If allowed to stand, the Third Circuit's decision would require all concerned to rethink the basis for past as well as future industry limitations and standards, and would remove essential flexibility in establishing these regulations.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition for certiorari for three reasons that the Court has traditionally found compelling. First, the decision below creates a direct conflict among the circuits and is contrary to a decision of this Court. Second, the decision below raises an issue of nationwide importance concerning a major EPA program. Third, the decision below is at odds with the language and structure of the Clean Water Act.

I. The Decision Below Creates A Conflict In The Circuits And Is Contrary To A Prior Decision Of This Court.

The court below acknowledged that its decision directly conflicts with the decision of the Court of Appeals for the Fourth Circuit in *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (4th Cir. 1980). In *Appalachian Power*, the Fourth Circuit upheld an FDF variance regulation which allowed variances for toxic pollutants from EPA's BPT regulations for the steam electric industry. In upholding EPA's FDF variance regulation, the Fourth Circuit explicitly rejected the same NRDC argument that was accepted by the court below, namely that § 301(1) of the Act prohibits variances for toxic pollutants. The court stated that EPA had interpreted § 301(1) as applying only to those parts of § 301 that expressly authorize EPA to

modify applicable regulations,[15] and that the interpretation of the Agency is entitled to deference. (620 F.2d at 1048).[16] The Third Circuit considered the Fourth Circuit's reasoning and concluded that it "must disagree" with the Fourth Circuit's decision. (Appx. at A-43).

The decisions of the two courts of appeals cannot be reconciled. Although the Fourth Circuit addressed FDF variances from BPT regulations and the decision below involved FDF variances from pretreatment standards, in both cases the decision turns on the scope of § 301(1) of the Clean Water Act and its applicability to non-statutory FDF variances. The court below held that "FDF variances for toxic pollutant discharges are forbidden" by § 301(1) of the Act (Appx. at A-43), while the Fourth Circuit held that § 301(1) "does not apply so as to require the exclusion of toxic substances" from the FDF variance regulation. (620 F.2d at 1048).[17]

The decision below is also contrary to this Court's decision in *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) ("*du Pont*"). In *du Pont*, this Court held that EPA was authorized to set BPT limitations by regulation "so long as some allowance is made for variations in individual plants, as EPA has done by including a [FDF] variance clause in its 1977 limitations." (430 U.S. at 128). Subsequent decisions have interpreted this Court's opinion in *du Pont* as not merely authorizing EPA to allow FDF variances, but as *requiring* such

[15] *See* section III below.

[16] *See* du Pont, *supra*, at 135 n. 25.

[17] In Kennecott Copper Corp. v. EPA, 612 F.2d 1232 (10th Cir. 1979), the court implicitly upheld FDF variances from BPT regulations for toxic pollutants.

variances.[18] While the *du Pont* decision dealt with BPT regulations, the rationale of the Court in *du Pont* applies equally to the pretreatment standards involved here.[19]

In *du Pont*, the issue was whether EPA could set effluent limitations by regulation for industry categories in spite of the fact that the statute authorized BPT limits for point sources, while authorizing BAT limits for classes or categories of point sources. This Court stated that nothing in the Act "suggests any radical difference in the mechanism used to impose limitations for the 1977 [BPT] and 1983 [BAT] deadlines." (430 U.S. at 127). The Court therefore held that BPT limitations, like BAT limits, could be established "by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause" in its regulations. (*Id.* at 128).

Section 307(b) of the Act is silent on how "pretreatment standards for . . . pollutants" are to be established. The legislative history of § 307(b), however, indicates that pretreatment standards are to be comparable to BPT and BAT limitations.[20] Nothing else in the Act suggests any

[18] EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64, 72 (1980); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1032-34 (D.C. Cir. 1978). Prior to this Court's decision in *du Pont*, the Second Circuit also upheld the FDF variance clause. NRDC v. EPA, 537 F.2d 642 (2d Cir. 1976).

[19] The pretreatment standards for electroplating, which were before the court below, in fact were BPT-level standards. Appx. at A-76.

[20] H.R. Rep. No. 830, 95th Cong., 1st Sess. 87 (1977). *See* text at n.3 above. The Act contains a threshhold requirement that the pollutants controlled interfere with or pass through the POTW, and it also contains a provision for removal credits applicable to pretreatment standards. *See* 33 U.S.C. § 1317(b).

radical difference in the way in which pretreatment standards and BPT/BAT limitations should be imposed. Accordingly, EPA has been promulgating pretreatment standards equal or comparable to BPT/BAT limitations on an industry category basis. If EPA chooses to establish pretreatment standards by regulation on an industry category basis, then it must allow for FDF variances from such regulations for atypical plants not considered in the national regulations, consistent with this Court's decision in *du Pont*.[21]

We therefore submit that the decision below is contrary to this Court's decision in *du Pont* and conflicts with the sound decision of the Fourth Circuit in *Appalachian Power*.

II. The Decision Below Presents Important Questions Of Law Which Should Be Settled By This Court.

The decision of the Third Circuit that FDF variances are precluded for toxic pollutants undermines a central feature of the effluent limitations and standards program. This program is of singular importance to current efforts under the Clean Water Act to reduce the discharge of pollutants. EPA's regulations affect thousands of industrial dischargers. The Third Circuit's decision, issued just as the last "BAT" phase of the program is being implemented, is likely to cause confusion, further litigation, and delay in this program.

The Clean Water Act requires EPA to take into account relevant differences among plants in promulgating

[21] The addition of § 301(1) to the Act after this Court's decision in *du Pont* was not intended to limit the applicability of FDF variances to non-toxic pollutants, as discussed below in section III.

effluent limitations and standards. The Third Circuit's ruling thus leaves EPA and the public in a quandry. The Agency has promulgated effluent guidelines and standards for many of the 21 major industries based upon a consideration of typical plants, and relying on the FDF variance clause to handle atypical plants. If the Third Circuit's decision is allowed to stand, then the basis for the prior regulations is subject to question. If § 301(1) of the Act were to preclude FDF variances for toxic or priority pollutants, EPA would be subject to requests by industry to reopen previously promulgated regulations to address the atypical plants not previously considered. If the Agency refused to do so, it would be subject to possible legal challenges in the courts.[22]

The Third Circuit's decision also has an impact on regulations currently being developed by the Agency. EPA is under judicially imposed deadlines to issue the technology-based regulations for the remaining industry categories, which include the organic chemicals industry.[23] A change in procedures to address atypical or unique plants will only complicate and delay EPA's efforts to complete the rulemaking process for those industries.

An important issue raised in this case is EPA's discretion to proceed by way of individual order rather than

[22] EPA's effluent limitations and standards regulations have in the past been held invalid for failure to consider relevant factors. American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975), *cert. denied*, 435 U.S. 914 (1978); FMC Corp. v. Train, 539 F.2d 973 (4th Cir. 1976); Tanners' Council of America v. Train, 540 F.2d 1188 (4th Cir. 1976). Some regulations were upheld by the courts on the grounds that the FDF variance procedure was available to address atypical situations. Kennecott Copper Corp. v. EPA, *supra* n.17.

[23] *See* NRDC v. Train, *supra* n.3.

rulemaking to address atypical situations. EPA could in theory have chosen to address all plants, including atypical plants, by establishing sufficient subcategories of plants in the original technology-based standards regulations.[24] This course proved impractical due to data, resource and time constraints. As a result, EPA proceeded to address the typical plants in the national regulations, leaving to a deferred procedure atypical plants not previously considered. The decision of the Third Circuit, which deprives EPA of its chosen method of proceeding, is contrary to this Court's important decision in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), and its progeny.[25]

In *Chenery* the issue was whether the SEC was required to issue a rule prohibiting certain actions or whether it could bar those same actions in individual cases. The Court emphasized that, as here, "problems may arise in a case which the administrative agency could not reasonably foresee," or the problems may be "so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule." (332 U.S. at 202-203). The Court concluded that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." (*Id.* at 203). In barring EPA's informed choice of the FDF procedure to deal with atypical plants, the decision below is contrary to the principles established by this Court in *Chenery*.

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[24] At oral argument below, counsel for NRDC agreed that EPA "can implement the pretreatment standards flexibly . . . through subcategories." (Transcript at 247.)

[25] *See also* NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-95 (1974); NAACP v. FPC, 425 U.S. 662, 668-69 (1976).

The decision of the Third Circuit is directly applicable to the FDF variance clause for pretreatment standards under the Act. The regulations in question were reviewed directly in the court of appeals under § 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b). Under that provision, challenges to rules must be commenced within 90 days of promulgation. Thereafter, the rules are not subject to judicial review, not even as a defense in civil or criminal litigation. Thus, only this Court can address the issues raised by the decision below.[26]

There is a likelihood of further litigation of the FDF issue as applied to direct dischargers. Pending in the D.C. Circuit are cases involving EPA's NPDES permit regulations.[27] NRDC has notified the D.C. Circuit that it intends to challenge the FDF variance clause for direct dischargers on the same grounds raised in the Third Circuit for pretreatment.

In the statement of the case, we described the complexity and scope of EPA's national rulemaking program for BPT, BAT and pretreatment limitations and standards. Because the decision of the Third Circuit raises fundamental questions as to the basis of this important program, review by this Court is warranted.

III. The Decision Below Upsets EPA's Reasonable Construction Of The Act.

The long-established FDF variance procedure is not specifically provided for in the Clean Water Act. How-

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[26] We do not, however, rule out the possibility of subsequent challenges to pretreatment standards by atypical plants not considered by EPA, through judicial actions or petitions to EPA seeking revised regulations. *See* text at n.22 above.

[27] NRDC, *et al.* v. EPA, D.C. Cir. Nos. 80-1607, *et al.*

ever, the Act does expressly authorize certain statutory modifications to the technology-based standards. For example, § 301(c) of the Act authorizes a modification of BAT limits based on the economic capabilty of the particular plant or owner. 33 U.S.C. § 1311(c) (1976).[28] Section 301(1) of the Act, enacted in 1977, states that EPA may not modify any of the requirements of that section for toxic pollutants, which means that EPA cannot issue a § 301(c) modification for a toxic pollutant. However, nothing in the language or history of § 301(1) of the Act indicates that Congress intended to preclude FDF variances for toxic pollutants.

When Congress adopted the 1977 amendments to the Clean Water Act, this Court's decision in *du Pont* had already been rendered. Yet nothing in § 301(1) or its legislative history indicates that Congress intended to end the EPA's long-standing practice of providing for FDF variances or to overrule the *du Pont* decision requiring variances. In fact, as the court below admitted, the legislative history of § 301(1) indicates that Congress was "primarily concerned with prohibiting modifications under § 301(c). . . ." (Appx. at A-42.)[29] The court below nonetheless rejected the Agency's distinction between

[28] Such individualized economic capability is not one of the statutory factors for the technology-based limitations. *See* notes 4 and 20 above. Section 301(g) of the Act authorizes a modification of BAT limits where water quality would be protected, but by its terms does not apply to toxic pollutants. 33 U.S.C. § 1311(g) (Supp. V 1981).

[29] Congressman Roberts, one of the leaders in the House of Representatives for the 1977 amendments to the CWA, stated,

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 328-29 (1978).

variances and § 301 modifications, stating that if Congress was willing to prohibit § 301(c) modifications for toxic pollutants, then it was difficult to imagine why Congress would have permitted FDF variances for toxic pollutants. (Appx. at A-43.) The Third Circuit's decision is based on a failure to understand the difference between FDF variances and § 301(c) modifications as articulated by this Court.

Section 301(c) allows a discharger to avoid compliance with BAT requirements based on the discharger's individual economic capability. A discharger that satisfies the requirements of § 301(c) qualifies for a variance "simply because the [discharger] could not afford a compliance cost that is not fundamentally different from those the Administrator has *already considered*. . . ." *EPA* v. *Nat'l Crushed Stone Ass'n*, *supra*, 449 U.S. at 78 (emphasis added). Congress quite reasonably could have concluded that such a discharger should be required to meet applicable technology-based requirements for toxic pollutants, regardless of its individual economic capability. A section 301(c) modification is based upon a criterion outside of the technology-based factors of the Act.[30]

An FDF variance is not an "exemption" from the Act's technology-based requirements for BPT, BAT or pretreatment. It is a determination of the BPT, BAT or pretreatment requirements for an individual discharger, based on the statutory factors and circumstances con-

[30] *See* notes 4, 20, and 28 above.

cerning the discharger that were *not considered* in the development of standards for the industry. This distinction was explained by this Court as follows in discussing the FDF variance:

> If a point source can show that its situation . . . is not within the range of circumstances considered by the Administrator, then it may receive a variance. . . . In such situations, the variance is an acknowledgment that the uniform BPT limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete.[31]

In essence, when EPA grants an FDF variance it is creating a new subcategory for a plant, after notice and an opportunity for a public hearing, and establishing standards for that subcategory based on the statutory factors.

Subcategorization of an industry is within the sound discretion of the Agency unless the Agency acts arbitrarily and capriciously. *Kennecott Copper Corp.* v. *EPA*, *supra* n.17. The objective of subcategorization is to ensure that similar plants will be subject to similar requirements.[32] EPA cannot always collect or consider all relevant data to establish the necessary subcategories, however, particularly within the time frames contemplated by the Act and imposed by the courts.[33] EPA has therefore provided the FDF variance mechanism as the way in which EPA, a member of the public, or a discharger may demonstrate, after public notice and an

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[31] EPA v. Nat'l Crushed Stone Ass'n, *supra*, 449 U.S. at 77-78.

[32] S. Rep. No. 1236, 92d Cong., 2d Sess. 126 (1972).

[33] *See* NRDC v. EPA, *supra* n.18.

opportunity for a public hearing, that a different subcategory should have been established for a particular, fundamentally different plant based upon the factors set forth in the statute.

EPA regulations provided for FDF variances well before this Court's decision in *du Pont*. Congress undoubtedly has been aware of EPA's interpretation of the Act allowing such FDF variances, yet it has never taken action expressly to prohibit such variances. The Fourth Circuit was correct in *Appalachian Power*. An FDF variance is not a modification precluded by § 301(1) of the Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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December 1983

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2256

NATIONAL ASSOCIATION OF METAL FINISHERS, ELECTROPLATERS OF YORK, INC. AND PIONEER METAL FINISHING, INC.,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

No. 79-2443

THE INSTITUTE FOR INTERCONNECTING AND PACKAGING ELECTRONIC CIRCUITS,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Nos. 80-1008, 81-1210, 81-1279

FORD MOTOR COMPANY, INC.,
Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE, Administrator, United States Environmental Protection Agency,
Respondents

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Intervenor

No. 81-1351

NATIONAL ASSOCIATION OF METAL FINISHERS and INSTITUTE FOR INTERCONNECTING AND PACKAGING ELECTRONIC CIRCUITS,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

No. 81-1712

GENERAL MOTORS CORPORATION,
Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and WALTER BARBER, Acting Administrator, United States Environmental Protection Agency,
Respondents

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Intervenor

No. 81-1977

NATURAL RESOURCES DEFENSE COUNCIL, INC.
917 15th Street, N.W., Washington, D.C. 20005,
Petitioner

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
401 M Street, S.W., Washington, D.C. 20460 and
DOUGLAS M. COSTLE, ADMINISTRATOR,
U.S. Environmental Protection Agency,
401 M Street, S.W., Washington, D.C. 20460,
Respondents

CHEMICAL MANUFACTURERS ASSOCIATION
AMERICAN CYANAMID COMPANY
FMC CORPORATION
UNION CARBIDE CORPORATION,
Intervenors

No. 81-1978

UNITED STATES BREWERS ASSOCIATION,
Petitioner

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, and ENVIRONMENTAL PROTECTION AGENCY,
Respondents

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Intervenor

No. 81-1979

MANUFACTURING CHEMISTS ASSOCIATION, AMERICAN PAPER INSTITUTE, NATIONAL FOREST PRODUCTS ASSOCIATION, NATIONAL PAINT AND COATINGS ASSOCIATION, SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION, AIR PRODUCTS AND CHEMICALS, INC., AMERICAN CYANAMID COMPANY, FMC CORPORATION, HERCULES INCORPORATED, SHELL OIL COMPANY, and UNION CARBIDE CORPORATION,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Intervenor

No. 81-1981

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES,

Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Intervenor

No. 81-1982

NATIONAL ASSOCIATION OF METAL FINISHERS,

Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Intervenor

No. 81-1983

CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN CYANAMID COMPANY, FMC CORPORATION, UNION CARBIDE CORPORATION,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Intervenor

No. 81-1984

AMERICAN PAPER INSTITUTE and NATIONAL FOREST PRODUCTS ASSOCIATION,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Intervenor

No. 81-1985

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
1725 Eye Street, N.W., Washington, D.C. 20006,

Petitioner

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
401 M Street, S.W., Washington, D.C. 20460,

Respondent

CHEMICAL MANUFACTURERS ASSOCIATION
AMERICAN CYANAMID COMPANY
FMC CORPORATION
UNION CARBIDE CORPORATION,
Intervenors

No. 81-2119

METAL FINISHING ASSOCIATION
OF SOUTHERN CALIFORNIA,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

No. 81-2150

INTERLAKE, INC., REPUBLIC STEEL
CORPORATION and UNITED STATES
STEEL CORPORATION,
Petitioners

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,
Intervenor

AMERICAN IRON & STEEL INSTITUTE
ROUGE STEEL CO.,
Intervenors

No. 81-2151

CHICAGO ASSOCIATION OF COMMERCE AND
INDUSTRY, ILLINOIS MANUFACTURERS'
ASSOCIATION, and MID-AMERICAN LEGAL
FOUNDATION,
Petitioners

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,
Intervenor

ON PETITIONS FOR REVIEW OF ACTIONS
OF THE ENVIRONMENTAL PROTECTION AGENCY

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Before: GIBBONS, HUNTER and BECKER, *Circuit Judges*

Opinion filed September 20, 1983

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IV. CONCLUSION

TABLE OF ABBREVIATIONS

AISI	American Iron and Steel Institute
BAT	Best Available Technology Economically Achievable
BDT	Best Available Demonstrated Control Technology
BPT	Best Practicable Control Technology Currently Available
CACI	Chicago Association of Commerce and Industry
CMA	Chemical Manufacturing Association
EPA	Environmental Protection Agency
FDF	Fundamentally Different Factor
GM	General Motors Corp.
IIPEC	Institute for Interconnecting and Packaging Electronic Circuits
J. App.	Joint Appendix
Legis. Hist.	Legislative History
Me°	Regulated Metal in Influent
MFASC	Metal Finishing Association of Southern California

NAMF	National Association of Metal Finishers
NPDES	National Pollutant Discharge Elimination System
NRDC	National Resources Defense Council
PM	Precipitable Metals in Influent
POTW	Publicly Operated Treatment Works
R. Add.	Addendum of Respondent
TSS	Total Suspended Solids
TTO	Total Toxic Organics
USBA	United States Brewers Association
Xme	Ratio of Me* to PM

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. Section 307 of the Clean Water Act[1] directs the Administrator of the Environmental Protection Agency ("EPA") to promulgate regulations requiring industrial facilities to pretreat the pollutants that they discharge into public sewage treatment systems. The Administrator has promulgated both general pretreatment regulations[2] and regulations establishing categorical pretreatment standards for existing electroplating sources.[3] The petitioners in these consolidated cases seek review of the Administrator's actions in promulgating certain provisions of those regulations. Under section 509 of the Clean Water Act[4] we have jurisdiction to exercise a limited review of the Administrator's actions. We may overturn those actions only if they are arbitrary, capricious or otherwise contrary to law.[5] Under that

1. 33 U.S.C. §1317(b), (c) (1976 & Supp. I 1977).

2. 43 Fed. Reg. 27,736 (1978), *as amended*, 46 Fed. Reg. 9404 (1981) (codified at 40 C.F.R. §§403.1.-16 (1982)).

3. 44 Fed. Reg. 52,590 (1979), *as amended*, 46 Fed. Reg. 9462 (1981) (codified at 40 C.F.R. §§413.01.-84 (1982)).

4. 33 U.S.C. §1369(b)(1)(C) (1976).

5. *See* 5 U.S.C. §706 (1976).

standard of review, we find invalid certain provisions both of the general pretreatment regulations and of the categorical electroplating standards. Because it is not for us to rewrite those provisions, we will remand them to the Administrator.

I. BACKGROUND

A. *The Statute*

2. In 1972 Congress amended the Federal Water Pollution Control Act ("the Act" or "the Clean Water Act"),[6] setting as a national goal the elimination, by 1985, of the discharge of pollutants into navigable waters, 33 U.S.C. §1251(a)(1) (1976). To reach that goal the Act directed the Administrator of EPA to promulgate regulations setting limits on the pollution that can be discharged by three general types of "point sources," *see id.* §1362(14) (1976 & Supp. I 1977).

3. First, the Administrator was to establish effluent limitations for point sources which discharge pollutants directly into navigable waters ("direct dischargers"). The Administrator had to define effluent limitations for categories or classes of point sources which would require existing direct dischargers to employ by 1977 the best practicable control technology currently available ("BPT"), *id.* §§1311(b)(1)(A), 1314(b)(1) (1976), and to use by 1983-87 the best available technology economically achievable ("BAT"), *id.* §§1311(b)(2) (1976 & Supp. I 1977), 1314(b)(2) (1976). For newly-constructed direct dischargers the Administrator had until 1974 to establish "new source" performance standards requiring the application of the best available demonstrated control technology ("BDT"). *Id.* §1316. The Administrator had to set the BPT, BAT, and BDT limitations by considering the factors specified in sections 304(b) and 306(b)

6. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in sections of 33 U.S.C. ch. 26 (1976 & Supp. V 1981)).

of the Act, *id.* §§1314(b), 1316(b). He was to apply those limitations to individual direct dischargers through the National Pollutant Discharge Elimination System ("NPDES") permit issued to the discharger under section 402 of the Act, *id.* §1342 (1976 & Supp. I 1977).

4. Second, the Act mandated that the Administrator set effluent limitations for publicly owned treatment works ("POTWs") engaged in the treatment of municipal sewage or industrial wastewater. *See id.* §1292(2) (1976 & Supp. I 1977). Under the Act the Administrator had to establish effluent limitations, based on "secondary treatment," which POTWs had to meet by 1977. *Id.* §§1311(b)(1)(B), (C), 1314(d)(1) (1976). The limitations thus established were to be applied to each individual POTW through its NPDES permit. *Id.* §1342 (1976 & Supp. I 1977).

5. Third, section 307 of the Act addressed the "indirect dischargers," point sources which discharged their pollutants not directly into navigable waters but into POTWs. Congress recognized that the pollutants which some indirect dischargers release into POTWs could interfere with the operation of the POTWs, or could pass through the POTWs without adequate treatment. To prevent such discharges by existing sources, Congress directed in section 307(b)(1) of the Act:

> (b)(1) The Administrator shall . . . publish proposed regulations establishing pretreatment standards for introduction of pollutants into [POTWs] for those pollutants which are determined not to be susceptible for treatment by such treatment works or which would interfere with the operation of such treatment works. . . . Pretreatment standards under this subsection . . . shall be established to prevent the discharge of any pollutant through [POTWs], which pollutant interferes with, passes through or otherwise is incompatible with such works.

33 U.S.C. §1317(b)(1) (1976); *see also id.* §1314(g) (Supp. I 1977). The Administrator had to designate the categories of existing sources to which each such standard would apply, promulgate the standards by 1973, and revise the standards as control technologies and industrial processes changed. *Id.* §1317(b). For newly-constructed indirect dischargers the Act directed that by 1974 the Administrator had to promulgate pretreatment standards for each category of new sources which "shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works." *Id.* §1317(c). New and existing indirect dischargers did not need to obtain NPDES permits, but instead had pretreatment standards imposed directly upon them.

6. In 1977 Congress amended the Act by passing the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 ("the 1977 Amendments"). Section 54 of the 1977 Amendments added a sentence to section 307(b)(1) permitting a POTW to modify the pretreatment requirement of an existing indirect discharger if the POTW could successfully remove all or part of the toxic pollutants released by that discharger. *Id.* §54(a), 91 Stat. 1591 (amending 33 U.S.C. §1317(b)(1) (Supp. I 1977)).

B. *The Regulations*

7. The Administrator elaborated his regulatory approach to indirect dischargers in his National Pretreatment Strategy, 43 Fed. Reg. 27,759 (1978), and in the consent decree in *NRDC v. Train*, 8 Env't Rep. Cas. (BNA) 2110 (D.D.C. 1976), *modified sub nom. NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979), *aff'd in part sub nom. Environmental Defense Fund v. Costle*, 636 F.2d 1229 (D.C. Cir. 1980), *modified on remand sub nom. NRDC v. Gorsuch*, Nos. 2153-73 *et*

al. (D.D.C. Oct. 26, 1982). The Administrator announced that he would promulgate two types of pretreatment standards.

8. The first type, "categorical" pretreatment standards, would establish numerical limits on the discharge, by twenty-one specific categories of industrial sources, of particular toxic pollutants which could cause interference with or pass through POTWs. 43 Fed. Reg. 27,760, 27,771-73 (1978); *NRDC v. Train*, 8 Env't Rep. Cas. (BNA) at 2130-36. Categorical pretreatment standards would be set to require the application of similar levels of control technology as the Act mandated for direct dischargers. 43 Fed. Reg. 27,760-63 (1978); 42 Fed. Reg. 6480 (1977). The Administrator agreed to promulgate categorical pretreatment standards "generally analogous to best practicable control technology currently available" (BPT) for eight industries by May 15, 1977. *NRDC v. Train*, 8 Env't Rep. Cas. (BNA) at 2128 ¶13. For all twenty-one industrial categories the Administrator would then promulgate categorical pretreatment standards based on BAT for existing sources and BDT for new sources. 43 Fed. Reg. 27,760 (1978); see *NRDC v. Gorsuch; NRDC v. Train*, 8 Env't Rep. Cas. (BNA) at 2123-26.

9. The second type of pretreatment standard, the "prohibited discharge" standard, would not set numerical limits on the discharge of particular pollutants by specified sources. 43 Fed. Reg. 27,759-60 (1978). Rather, the prohibited discharge standard would establish a general prohibition on the release of any pollutants by any nondomestic source if those pollutants interfere with or pass through a POTW. *Id.*

1. *The General Pretreatment Regulations*

10. The General Pretreatment Regulations for Existing and New Sources of Pollution, 40 C.F.R. §403.1.-16 (1982), serve to implement the two types of

pretreatment standards. First, the general pretreatment regulations themselves contain the prohibited discharge standard generally forbidding interference and pass through, *id.* §403.5, and define the terms "interference" and "pass through," *id.* §403.3(i), (n). Second, the general pretreatment regulations establish the mechanisms and procedures governing the separately promulgated categorical pretreatment standards. The general regulations define whether a source is a "new source" under the standards. *Id.* §403.3(k). The general regulations contain a mechanism through which the existing industrial user of a POTW can obtain a variance from a categorical discharge limit if the user can show that during the development of the standard EPA had considered "fundamentally different" factors than those relating to the user's operation ("the FDF variance provision"). *Id.* §403.13. The regulations set up the procedure by which a POTW can revise an industrial user's categorical discharge limit to reflect the POTW's removal of the user's pollutants ("the removal credit provision"). *Id.* §403.7. Finally, the regulations provide a formula to calculate an adjusted categorical discharge limit where the industrial user mixes the effluent from the regulated process with other wastewaters prior to pretreatment ("the combined wastestream formula"). *Id.* §403.6(e).

11. The Administrator first proposed the general pretreatment regulations on February 2, 1977. 42 Fed. Reg. 6476 (1977). He promulgated the regulations on June 26, 1978. 43 Fed. Reg. 27,736 (1978). On October 29, 1979, the Administrator proposed amendments to the regulations, 44 Fed. Reg. 62,260 (1979), which he promulgated on January 28, 1981, 46 Fed. Reg. 9404 (1981). The Administrator then attempted to postpone indefinitely the effective date of first all and later part of the general pretreatment regulations. 47 Fed. Reg. 4518 (1982); 46 Fed. Reg. 19,936, 50,502, 50,503 (1981). After we declared that indefinite postponement invalid in *NRDC v. EPA*, 683 F.2d 752 (3d Cir. 1982), the Ad-

ministrator reinstated the regulations' effective date of March 30, 1981. 47 Fed. Reg. 42,688 (1982); *see* 46 Fed. Reg. 11,971 (1981). On October 4, 1982, we granted the petitioners' unopposed motion to extend the regulations' effective date until June 30, 1981. 48 Fed. Reg. 2774 (1983).

12. *The Categorical Electroplating Standards*

12. The categorical pretreatment standards for the Electroplating Point Source Category, 40 C.F.R. §§413.01.-84 (1982), are BPT-level pretreatment standards set pursuant to the *NRDC v. Train* consent decree. 44 Fed. Reg. 52,592, 52,608 (1978); *see* 8 Env't Rep. Cas. (BNA) at 2128 ¶13(b). The categorical electroplating standards cover 7752 existing firms with electroplating operations, the firms falling in three broad groups: independent "job shops," firms performing electroplating as their primary line of business; independent manufacturers of printed circuit board; and "captive operations," electroplating sections of firms which perform electroplating as part of their manufacture of another product. *See* 44 Fed. Reg. 52,593 (1979); 43 Fed. Reg. 6561-62 (1978). The electroplating standards divide those firms into seven subcategories, based on the electroplating process employed.[7] For each subcategory the standards, *inter alia*, set numerical limits on the dischargeable concentrations of cyanide and several metals (*e.g.*, cadmium, chromium, copper, lead, nickel, and zinc). 40 C.F.R. §§413.14.-84 (1982). Electroplating sources discharging less than 10,000 gallons per day of electroplating process wastewater have to meet limits for only lead, cadmium and amenable cyanide. *Id.* "Integrated" facilities, which combine the process wastestream from their captive electroplating operations with other wastewaters prior to pretreatment, are instructed to adjust their discharge limits using the combined wastestream formula. *Id.* §413.04; *see id.* §413.02(h).

7. The subcategories are electroplating of common metals, electroplating of precious metals, anodizing, coatings, chemical etching and milling, electroless plating, and printed circuit board manufacture. 40 C.F.R. §§413.10, .20, .40, .50, .60, .70, .80 (1982).

13. The Administrator proposed the categorical electroplating standards on February 14, 1978, 43 Fed. Reg. 6560 (1978), and promulgated them on September 7, 1979, 44 Fed. Reg. 52,590 (1979), *corrected*, *id.* at 56,360. Following promulgation petitioners National Association of Metal Finishers and Institute for Interconnecting and Packaging Electronic Circuits filed petitions for review in this court. Nos. 79-2256, 79-2443. On March 7, 1980, those parties and EPA reached a settlement agreement ("the NAMF Settlement Agreement"). Addendum to Respondent's Brief at D-1 [hereinafter cited as "R. Add."]. Pursuant to that agreement the Administrator on July 3, 1980, proposed several amendments to the 1979 electroplating standards. 45 Fed. Reg. 45,322 (1980). In response to the petition for review of Ford Motor Co., No. 80-1008, EPA proposed other changes, 45 Fed. Reg. 19,245 (1980). Ford later filed a petition for reconsideration of the 1979 standards. J. App. at 2082. On January 28, 1981, the Administrator denied Ford's petition for reconsideration, 46 Fed. Reg. 9476 (1981), and promulgated the amendments to the electropolating standards, *id.* at 9462, *corrected*, *id.* at 30,625. The deadline for compliance with the electroplating standards for integrated facilities was set at three years from the effective date of the combined wastestream formula,[8] while non-integrated facilities had a compliance date of May 12, 1982, 46 Fed. Reg. 9462 (1981), later modified to April 27, 1984, 48 Fed. Reg. 2775 (1983); 46 Fed. Reg. 43,973 (1982).

8. As a result of our decision in *NRDC v. EPA*, 683 F.2d 752 (3d Cir. 1982), and of our order of October 4, 1982, the effective date of the combined wastestream formula is June 30, 1981. The deadline for compliance by integrated electroplaters is thus June 30, 1984. *See* 48 Fed. Reg. 2774 (1983).

14. On August 31, 1982, the Administrator published the proposed Metal Finishing regulations, which established BAT pretreatment standards for most of the indirect dischargers presently covered by the electroplating standards. 47 Fed. Reg. 38,462-63 (1982). Only existing job shops and printed circuit board manufacturers would remain under the electroplating standards, which would be amended to restrict the discharge of toxic organic pollutants. *Id.* at 38,464, 38,468. On July 15, 1983, the Administrator promulgated the Metal Finishing regulations. 48 Fed. Reg. 32,462 (1983) (to be codified at 40 C.F.R. §433.10.-17).

C. *The Consolidated Cases*

15. As noted above, National Association for Metal Finishers ("NAMF"), Institute for Interconnecting and Packaging Electronic Circuits ("IIPEC"), and Ford Motor Co. ("Ford") filed petitions for review of the 1979 electroplating standards. Nos. 79-2256, 79-2443, 80-1008. Ford, NAMF, General Motors Corp. ("GM"), and Metal Finishing Association of Southern California ("MFASC") petition for review of the 1981 electroplating amendments. Nos. 81-1279, 81-1351, 81-1712, 81-2119. Ford also petitions for review of the Administrator's denial of its petition for reconsideration of the 1979 electroplating standards, No. 81-1214. We address that appeal in *Ford Motor Co. v. EPA*, — F.2d — (3d Cir. 1983).

16. Petitioners National Resources Defense Council ("NRDC"), United States Brewers Association ("USBA"), and Chemical Manufacturing Association ("CMA") petition for review of the 1978 general pretreatment regulations. Nos. 81-1977, 81-1978, 81-1979. Petitioners Ford, NAMF, CMA, NRDC, Interlake, Chicago Association of Commerce and Industry ("CACI") and others seek review of the 1981 general pretreatment regulations. Nos. 81-1210, 81-1981, 81-1982, 81-1983, 81-1984, 81-1985, 81-2150, 81-2151.

17. Consideration of the cases was necessarily held pending our resolution in *NRDC v. EPA* of the challenge to the Administrator's indefinite postponement of the 1981 general pretreatment amendments. Judge Becker of this Court then presided over a series of conferences in which he consolidated the cases, set a briefing schedule, and, on October 29, 1982, limited the subjects of briefing.[9]

D. *The Standard of Review*

18. Under section 10(e) of the Administrative Procedure Act, we may not invalidate agency actions unless we find them to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A) (1976). This standard sets the level of deference with which we must review the agency's actions for their statutory authority, substantive validity and procedural regularity. *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024 (D.C. Cir. 1978).

19. We must extend "great deference to the interpretation given the statute by the officers or agency charged with its administration." *EPA v. National Crushed Stone Association*, 449 U.S. 64, 83 (1980) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)); *American Iron & Steel Institute v. EPA ("AISI I")*, 526 F.2d 1027, 1041-42 (3d Cir. 1975), *mandate recalled in part*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978). If an act is susceptible to more than one reasonable interpretation, we must accept any reasonable interpretation chosen by the agency. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *see NRDC v. Train*, 421 U.S. 60, 75 (1975). If the agency rejects the reasonable interpretation of the statute, however, we must "honor the clear

9. Specifically, briefing on the challenges of the industrial petitioners to the general pretreatment regulations was limited to the removal credits provision. 40 C.F.R. §403.7 (1982), the combined wastestream formula, *id.* §403.6(e), and the definitions of "interference" and "pass through," *id.* §403.3(i), (n).

meaning of a statute, as revealed by its language, purpose and history." *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 556 n.20 (1979); *see FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 37 (1981).

20. Our inquiry into the substantive basis for the agency's actions must be searching and careful, but our review is a narrow one. As the Supreme Court has recently stated:

> The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transp. Inc. v. Arkansas-Best Freight System*, [419 U.S. 281, 285 (1974)], *Citizens to Preserve Overton Park v. Volpe*, [401 U.S. 402, 416 (1971)]. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp. Inc. v. Arkansas-Best Freight Systems*, [419 U.S. at] 286. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 51 U.S.L.W. 4953, 4956-57 (U.S. 1983).

21. Our review of an agency's "observance of procedure required by law," 5 U.S.C. §706(2)(D) (1976), is more exacting. *NRDC v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982); *see Weyerhaeuser*, 590 F.2d at 1027-28. Under section 4 of the Administrative Procedure Act, an agency initiating informal rulemaking must first publish a general notice which includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3) (1976). Such notice must "fairly apprise interested persons" of the subjects and issues dealt with in the rule ultimately promulgated. *American Iron & Steel Institute v. EPA ("AISI II")*, 568 F.2d 284, 290-93 (3d Cir. 1977); *see Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976) (en banc), *cert. denied*, 426 U.S. 941 (1976). The agency must then give interested persons an opportunity to participate in the rulemaking through the submission of written comments. 5 U.S.C. §553(c) (1976). After considering the relevant comments submitted, the agency must incorporate in the promulgated rules "a concise general statement of their basis and purpose." *Id.* To ensure meaningful judicial review, the agency in that statement and in its supporting materials must articulate the rational basis for the choices it has made; however, as stated above, we "should not reverse an agency's decision that is not fully articulated where we can reasonably discern the basis for the agency's action." *AISI I*, 526 F.2d at 1047; see *AISI II*, 568 F.2d at 295-96.

22. Finally, we note that the Administrator's actions are entitled to a presumption of regularity. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415

(1971). A party petitioning for review of an agency's regulations bears the burden of overcoming that presumption. *Lewes Dairy v. Freeman*, 401 F.2d 308, 316 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *accord Environmental Defense Fund v. Costle*, 657 F.2d 275, 283 n.28 (D.C. Cir. 1981). If after adequate notice and opportunity to comment a petitioner claims on appeal that the agency overlooked technical, factual and policy issues not raised in comments before the agency, that petitioner will have less latitude in its complaints, *Weyerhaeuser*, 590 F.2d at 1028 n.15, or in special circumstances will be barred altogether, *AISI I*, 526 F.2d at 1050; *see American Frozen Food Institute v. Train*, 539 F.2d 107, 134 (D.C. Cir. 1976).

II. THE GENERAL PRETREATMENT REGULATIONS

23. NRDC and all the other petitioners ("industrial petitioners") raise challenges to several provisions of the general pretreatment regulations, 40 C.F.R. §§403.1.-16 (1982). We consider those challenges in the following order: (A) the definitions of "interference" and "pass through;" (B) the definition of "new sources;" (C) the FDF variance provision; (D) the removal credits provision; and (E) the combined wastestream formula.

A. *The Definitions of "Interference" and "Pass Through"*

24. Section 403.3 of the general pretreatment regulations defines "interference" and "pass through." 40 C.F.R. §403.3(i), (n) (1982). The industrial petitioners in their joint brief ("joint petitioners") and USBA contend that the breadth of the definitions of "interference" and "pass through" violates the Act because the definitions subject indirect dischargers to penalties without consideration of fault, causation or consequences. Joint petitioners argue that the definitions were improperly

promulgated. We will grant the petitions for review in Nos. 81-1982, 81-1983, 81-1984, 81-2150, and 81-2151, and will remand the definition of both "interference" and of "pass through."

1. *Interference*

25. Section 307(b) of the Act directs the Administrator to promulgate pretreatment standards to prevent the discharge of any pollutant through a POTW which "interferes with, passes through or is otherwise incompatible with such works." 33 U.S.C. §1317(b)(1) (1976 amended Supp. I 1977). Under that mandate the Administrator not only has promulgated the categorical pretreatment standards setting numerical limits upon discharges from certain regulated categories of industrial sources, but has also established a general prohibition applying to all non-domestic indirect dischargers whether or not they are subject to categorical pretreatment standards. *See* 40 C.F.R. §403.5(a) (1982). That "prohibited discharge" standard contains a general prohibition of the introduction into a POTW of pollutants that "Pass Through a POTW or Interfere with the operation or performance of the works." *Id.* §403.5(a). The prohibited discharge standard also specifically prohibits the introduction into a POTW of pollutants that in several specified ways cause interference.[10] Violation of the

10. Section 403.5(b) specifically prohibits the introduction to a POTW of:

(1) Pollutants which create [sic] a fire or explosion hazard in the POTW;

(2) Pollutants which will cause corrosive structural damage to the POTW . . .;

(3) Solid or viscous pollutants in amounts that will cause obstruction to the flow in the POTW resulting in Interference;

(4) Any pollutant . . . released in a Discharge in a flow rate and/or pollutant concentration which will cause Interference with the POTW[; and]

(5) Heat in amounts which will inhibit biological activity in the POTW resulting in Interference . . . .

40 C.F.R. §403.5(b) (1982).

prohibited discharge standard is unlawful and renders the violator liable to suit by the Administrator, by the State, by the POTW, or by any adversely affected party. 33 U.S.C. §§1317(d), 1319(b), (c), (f), 1342(b)(7), 1365(a) (1976 & Supp. I 1977). Violations may carry civil penalties of up to $10,000 per day, and criminal penalties of up to $25,000 per day and two years in prison. *Id.* §1319(c)(1), (d). In addition, if the violation is likely to recur the POTW is required to develop and enforce such specific effluent limits for its users as are necessary to ensure the POTW's future compliance with its NPDES permit. 40 C.F.R. §403.5(c)(2) (1982).

26. Section 403.3 provides the definition of "interference" as that term is used in the prohibited discharge standard. As originally promulgated in the 1978 general pretreatment regulations, section 403.3 defined "interference" as "an inhibition or disruption of a POTW's sewer system, treatment processes or operations which *contributes* to a violation of any requirement of [the POTW's] NPDES Permit." 43 Fed. Reg. 27747 (1978) (emphasis added). In 1979 the Administrator proposed to narrow the ambit of the definition by requiring an inhibition or disruption which "causes or significantly contributes" to the violation of the POTW's permit, and by including a "safe harbor" provision exempting from the definition inhibitions and disruptions caused by an indirect discharger "in compliance with specific prohibitions or standards developed by Federal, State or local governments." 44 Fed. Reg. 62,260, 62,265 (1979). As promulgated, however, the 1981 general pretreatment amendments omitted the safe harbor provision and defined "significantly contributes" using three numbered categories. 46 Fed. Reg. 9413 (1981). The amended regulations thus redefine "interference" as:

> an inhibition or disruption of the POTW . . . which is a cause of or significantly contributes to either a violation of any requirement of the POTW's NPDES

> permit (including an increase in the magnitude or duration of a violation) or to the prevention of sludge use or disposal by the POTW . . . . An industrial user significantly contributes to such a permit violation or prevention of sludge use or disposal . . . whenever such User:
>
> (1) Discharges a daily pollutant loading in excess of that allowed by contract with the POTW or by Federal, State or local law;
>
> (2) Discharges wastewater which substantially differs in nature or constituents from the User's average discharge; or
>
> (3) Knows or has reason to know that its Discharge, alone or in conjunction with Discharges from other sources, would result in a POTW permit violation or prevent sewage use or disposal . . . .

40 C.F.R. §403.3(i) (1982). .

27. Joint petitioners allege that the present definition is contrary to the Act because it renders an indirect discharger liable for interference even though its discharges did not cause the POTW's permit violation or sludge problem. They posit that an industrial user may be held liable if discharging more than average or beyond its contract limit, even though it is the discharge of another user of the POTW, or a malfunction or mistake at the POTW itself, that actually causes the inhibition or disruption. Joint petitioners contend that Congress did not intend to subject indirect dischargers to liability without proof of causation.

28. EPA argues that joint petitioners have misread the definition. EPA urges that the definition requires that causation be shown before liability is established. In its brief EPA emphasizes that an industrial user's discharge must "lead to" or "give rise to" the inhibition or disruption. Brief for Respondent (No. 79-2256) at 125-27. At oral argument EPA's counsel asserted that to

prove liability the Administrator must show that the discharge both caused the inhibition or disruption *and* fell within the three categories defining "significantly contributes." Transcript of Oral Argument at 133, 136. We cannot agree. The words "leads to" and "gives rise to" do not appear in the definition. Instead, the promulgated definition requires only that the discharge "is a cause of *or* significantly contributes," and defines "significantly contributes" by substituting three categories of discharger misconduct, at least two of which exclude any necessity for proving that the discharge caused the inhibition or disruption. 40 C.F.R. §403.3(i)(1), (2) (1982).[11] If the Administrator has not written the definition to require causation, we cannot rewrite the definition to match the representations of counsel.[12]

29. Given that section 403.3(i)'s definition of interference does not require causation to establish liability, we must now consider whether liability without causation is within the intent of Congress. We find that neither the language of the Act nor the intent of Congress appears to contemplate liability without causation. First, sections 307(b) and (c) requires that pretreatment standards "prevent the discharge of any pollutant . . ., *which pollutant* interferes with such works." *Id.* §1317(b), (c) (1976 & Supp. I 1977) (emphasis added). Section 307(c) explains that such standards must be promulgated "to insure that any source introducing pollutants into a [POTW] . . . will not *cause* a violation of the effluent limitations of such treatment works." *Id.* §1317(c) (1976) (emphasis added).

11. In describing those categories, the Administrator himself implied that the discharger misconduct need not cause the inhibition or disruption, but need only occur at the same time. In the first category, an industrial user is liable "if it violates any contract, law or ordinance, and there is an NPDES permit violation or sludge problem." 46 Fed. Reg. 9413 (1981). In the second category, "if the discharge . . . is in substantial variance with the User's average discharge . . . and there is a permit problem, then the User is *deemed* to have significantly contributed to such situtation." *Id.* at 9413-14 (emphasis added).

12. EPA urges that we rely on the agency to properly construe the definition in its enforcement actions. We do not believe that the promise of clarification in the future provides adequate certainty or guidance to dischargers who must comply in the present with the prohibited discharge standard. The Administrator, moreover, is not the only plaintiff who can institute enforcement actions. States, localities, POTWs and affected parties may also sue to enforce the standard, and may advance interpretations of "interference" not shared by the EPA. *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 660 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977).

30. Second, Congress made plain its intent that "[i]n no event is it intended that pretreatment facilities be required for compatible wastes as a substitute for adequate municipal waste treatment works." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 130, *reprinted in* 1972 U.S. Code & Ad. News 3776, 3807; *accord* H.R. Rep. No. 911, 92d Cong., 2d Sess. 113, *reprinted in* Senate Comm. on Public Works, 93d Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 753, 800 (1973) [hereinafter cited as "1972 Legis. Hist."].[13] If the inhibition or disruption is caused not by the industrial user's discharge but by a mistake or malfunction at the POTW, the industrial user will be punished for failing to substitute its own pretreatment for the POTW's impaired treatment. We do not think that Congress intended such liability. *See also AISI I*, 526 F.2d at 1056 (rejecting penalties for circumstances beyond discharger's control).

31. We conclude that given the language and purpose of the Act, an indirect discharge cannot be liable under the prohibited discharge standard unless it is a cause of the POTW's permit violation or sludge problem.

13. Relying primarily on those statements in the legislative history, USBA argues that the definition of interference must include a requirement that the POTW be well-designed and well-maintained. Our resolution of the causation issue makes it unnecessary for us to reach USBA's argument.

If the definition of "interference" required that an indirect discharger be both "the cause of" *and* "significantly contribute to" the POTW's permit violation, it would be consistent with that causation requirement. As written, however, the definition fails to require such causation, and thus violates the clear meaning of the Act.[14] We will therefore remand the entire definition of interference[15] to the Administrator.[16]

2. *Pass Through*

32. Joint petitioners allege that the definition of pass through in 40 C.F.R. §403.3(n) (1982) was promulgated without the notice and comment required under section 4 of the Administrative Procedures Act, 5 U.S.C. §553(c) (1976). They point out that the amendments

14. USBA, Interlake and NAMF challenge the Administrator's omission of the safe harbor provision in the 1981 amendments. *See* 46 Fed. Reg. 9414 (1981). Our resolution of the causation issue makes it unnecessary for us to determine whether a safe harbor provision must be included in the definition. Similarly, we need not consider the argument of joint petitioners and Interlake that parts of the definition of "significantly contributes" are impermissibly vague.

15. We recognize that the definition makes an indirect discharger liable if it is "a cause" as well as if it "significantly contributes." 40 C.F.R. §403.3(l) (1982). We also note that the third element in the definition of "significantly contributes" appears to require causation. *Id.* §403.3(l)(3); *see* 46 Fed. Reg. 9414 (1981). Theoretically, those fragments of the definition could be left unaffected by our holding. Given EPA's litigation position that "cause" and "significantly contributes" were meant to be read conjunctively, however, we think it more appropriate to remand the definition in its entirety rather than leave the remnants as a judicially-refashioned definition.

16. Joint petitioners also argue that the present definition of "interference" was improperly promulgated because the definition proposed in 1979 provided inadequate notice that the Administrator would define "significantly contributes" or delete the safe harbor provision. As the Administrator must subject the entire definition to notice and comment before it can again be effective, our remand of the definition renders petitioners' argument moot.

proposed in 1979 contained no suggestion that the Administrator intended to use or to define the term "pass through" in the general pretreatment regulations. *See* 44 Fed. Reg. 62,260-71 (1979). The Administrator nonetheless promulgated the definition of "pass through" in the 1981 general pretreatment amendments, justifying his failure to first propose the definition by saying that it was "almost identical" to the promulgated definition of interference. 46 Fed. Reg. 9416 (1981).

33. EPA now admits that the definition of "pass through" was promulgated without the notice and comment required by the Administrative Procedure Act. Brief for Respondent (No. 79-2256) at 132-33. EPA suggests that for that reason we should remand the definition to the Administrator; nevertheless, it contends that we are not barred from passing on the definition's substantive validity. *Id.* at 133 & n.*. We believe that it would be fruitless for us to review the definition before it has been submitted for public comment. We will therefore remand the definition of "pass through" in section 403.3(n) to the Administrator.[17]

B. *Definition of "New Source"*

34. "New source" is defined in section 403.3(k) of the general pretreatment regulations, 40 C.F.R. §403.3(k) (1982). Under that definition, if the Administrator fails to promulgate a new source pretreatment standard within 120 days of its publication, those sources whose construction began after the publication but before the promulgation of the proposed standard are not considered to be new sources. Petitioner NRDC argues that by excluding those sources the definition is inconsistent with the Act and is contrary to our holding

17. Joint petitioners request that we also remand the prohibited discharge standard, 40 C.F.R. §403.5 (1982). That provision is not within the scope of briefing set in our October 29, 1982 order, however.

in *Pennsylvania Department of Environmental Resources v. EPA*, 618 F.2d 991 (3d Cir. 1980). We agree, and will accordingly grant NRDC's petitions for review in Nos. 81-1977 and 81-1985.[18]

35. Under section 307(c) of the Act, the Administrator must promulgate new source pretreatment standards for any indirect discharger that would be a "new source" under section 306 of the Act if it were a direct discharger. 33 U.S.C. §1317(c) (1976). Section 306(a)(2) defines a "new source" as

> any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

Id. §1316(a)(2). Section 306(b)(1)(B) directs the Administrator to promulgate proposed standards of performance within 120 days after the publication of the proposed regulations. *Id.* §1316(b)(1)(B).

36. Section 403.3(k) of the general pretreatment regulations defines "new source" as any source whose construction commenced

> [a]fter proposal of Pretreatment Standards in accordance with section 307(c) of the Act which are applicable to such source, *but only if* the Standards are promulgated in accordance with section 307(c) within 120 days of their proposal.

40 C.F.R. §403.3(k)(2) (1982) (emphasis added). If the standards are not promulgated within 120 days of their proposal, only those sources whose construction began after *promulgation* are considered "new sources." *Id.* §403.3(k)(1); *see id.* §403.6(b).

18. We therefore need not reach NRDC's additional argument that the definition was improperly promulgated.

37. In *Department of Environmental Resources* we considered a similar definition of "new source" promulgated for a category of direct dischargers. We rejected EPA's definition as inconsistent with the basic policies of the Act. Congress, we found, "intended to subject as many firms as possible to the new source regulations." 618 F.2d at 999. By its plain meaning the definition of "new source" in section 306(a)(2) achieved that goal by subjecting to new source standards all businesses which initiated new construction after being put on notice by the publication of the proposed standards. We stated that if dischargers wished to limit their period of uncertainty by forcing the Administrator to promulgate proposed standards within section 306(b)(1)(B)'s 120-day deadline, the proper remedy was not the exemption of new construction from new source standards, but was a citizen suit under 33 U.S.C. §1365 (1976) seeking EPA compliance with the deadline. We therefore held that section 306(a)(2) had to be given its plain meaning, and we struck down the EPA's definition. 618 F.2d at 1000.

38. In this case EPA has conceded that the "new source" definition in section 403.3(k) is invalid under our holding in *Department of Environmental Resources*. Brief for Respondent (No. 81-1977) at 14.[19] Intervenor CMA argues nonetheless that the definition is valid under our holding and under the Act. CMA, however, fails either to distinguish *Department of Environmental*

19. On June 11, 1982, EPA moved for permission to rescind the §403.3(k) definition. In support of its request, EPA stated that it now felt that a definition of "new source" was unnecessary in the general pretreatment regulations, and that the agency would instead litigate the validity of its definition, as incorporated in the Consolidated Permit regulations, 40 C.F.R. §122.3 (1982), before the D.C. Circuit in *NRDC v. EPA*, No. 80-1607 (D.C. Cir. filed June 1, 1980). Brief for Respondent (No. 81-1977) at 14-15. On July 14, 1982, we denied EPA's motion. Because EPA has indicated that it will adhere to and apply its definition, and because it seeks dismissal for a technical reason, we should resolve the dispute. *See Dow Chemical Co. v. EPA*, 605 F.2d 673, 677-80 (3d Cir. 1979).

Resources,[20] or to proffer any arguments on the proper construction of section 306 which were not considered and rejected in that decision.[21] We hold, therefore, that the definition of "new source" in section 403.3(k) is invalid. We will remand the definition to the Administrator.

C. *The Fundamentally Different Factor Variance*

39. Section 403.13 of the general pretreatment regulations permits the Administrator to grant a variance from a categorical pretreatment standard to an existing indirect discharger within the category if the Administrator, in establishing the categorical standard, has considered factors "fundamentally different" from the factors relating to that source. 40 C.F.R. §403.13 (1982). Petitioner NRDC contends that the FDF variance is not authorized by the Act and is specifically prohibited insofar as it would permit the discharge of toxic pollutants. We need not determine whether the Administrator has authority to issue FDF variances, for we agree that such variances may not be issued for toxic pollutants. We will therefore grant NRDC's petitions for review in Nos. 81-1977 and 81-1985.

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20. CMA notes that in *Department of Environmental Resources* we reserved the situation where substantial delay and substantial change in the regulations occurred between the dates of proposal and promulgation, 618 F.2d at 1000 n.1, and contends that this case falls within our reservation. Specifically, CMA asserts that substantial delay and substantive change may well occur between the proposal and the promulgation of some future categorical new source pretreatment standard, and that in such an instance the definition might be valid. We do not believe, however, that such a hypothetical flaw in a future categorical standard can sustain the instant definition, which as part of the general pretreatment regulations will apply to all categorical pretreatment standards. *See generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926).

21. CMA does allege that citizen suits under 33 U.S.C. §1365 (1976) are not an effective remedy. As we have held, however, it is the remedy prescribed by Congress.

40. Section 307(b) of the Act directs the Administrator to promulgate pretreatment standards for existing indirect dischargers by category or categories of sources. 33 U.S.C. §1317(b)(1), (3) (1976 & Supp. I 1977). As he has chosen to regulate existing indirect dischargers in an analogous manner to direct dischargers, the Administrator bases the categorical pretreatment standards on the BPT and BAT levels of control technology set forth for direct dischargers in section 301(b) of the Act. *Id.* §1311(b). The Administrator determines those levels for existing indirect dischargers by considering the factors specified in section 304(b). *Id.* §1314(b).[22]

41. The fundamentally different factor variance in section 403.13 is also adopted from the regulatory scheme governing direct dischargers. Under the Consolidated Permit Regulations, 40 C.F.R. §§125.30.-32 (1982), existing direct dischargers may obtain FDF variances from BPT and BAT effluent limitations. Terming the concept equally applicable to pretreatment standards, the Administrator modeled the FDF variance provision for existing indirect dischargers after the FDF variance provision for direct dischargers. *See* 46 Fed. Reg. 9435-36 (1981); 44 Fed. Reg. 62,264-65 (1979); 43 Fed. Reg. 27,738 (1978); 42 Fed. Reg. 6481 (1977)..

42. The purpose of the FDF variance provision for indirect dischargers is stated in section 403.13(b):

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22. Section 304(b) states that the factors to be taken into account when determining BPT or BAT for a category of sources must include the age of the equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, and the non-water quality environmental impact (including energy requirements). *Id.* §1314(b)(1)(B), (2)(B). For BPT the Administrator must also consider the total cost of the application of technology in relation to the effluent reduction benefits to be achieved from such application. *Id.* §1314(b)(1)(B). For BAT the Administrator considers instead the cost of achieving the effluent reductions attainable. *Id.* §1314(b)(2)(A), (B).

> In establishing categorical Pretreatment Standards for existing sources, the EPA will take into account all the information it can collect, develop and solicit regarding the factors relevant to pretreatment standards under section 307(b). In some cases, information which may affect these Pretreatment Standards will not be available or, for other reasons, will not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the limits in categorical Pretreatment Standards . . . as they apply to a certain Industrial User within an industrial category or subcategory.

40 C.F.R. §403.13(b) (1982); *see id.* §125.30(b) (near-identical statement of purpose). Indirect dischargers, POTWs and other interested parties may request that an indirect discharger receive a variance. *Id.* §403.13(a), (b) (1982). Variances can be used to establish limits more or less stringent than that specified by the applicable categorical pretreatment standard. *See id.* §403.13(c)(2), (3). An industrial user seeking to obtain a discharge limit less stringent than required by the categorical standard must establish that the alternative limit is justified by factors relating to the discharge regulated by the categorical pretreatment standard which are fundamentally different from the factors considered by the Administrator in establishing the standard. *Id.* §403.13(b), (c)(1)(ii), (c)(2). In delineating the factors to be considered fundamentally different, section 403.13 includes most of the factors which section 304(b) directs the Administrator to consider in determining BPT and BAT standards. *Id.* §403.13(d); *see id.* §403.13(e).

1. *Variances from Pretreatment Standards*

43. NRDC argues that FDF variances from BPT and BAT pretreatment standards are contrary to the Act. NRDC correctly notes that while Congress expressly

provided for modification of other discharge limits,[23] the Act does not explicitly authorize FDF variances from the categorical pretreatment standards. EPA contends that the Act implicitly authorizes FDF variances for indirect dischargers, and relies on the approval given to the FDF variances for direct dischargers in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1978).

44. In *du Pont* the Supreme Court held that the Administrator had to provide for variances for direct dischargers from BPT effluent limitations. *Id.* at 128; *see EPA v. National Crushed Stone Association*, 449 U.S. 64, 72 & n.12 (1980). The Court found that section 301(b)(1) required that "some allowance [be] made for variations in individual plants" under *categorical* BPT effluent limitations because that section spoke of "effluent limitations for point sources," 33 U.S.C. §1311(b)(1)(A) (1976), rather than "effluent limitations for categories and classes of point sources," *id.* §1311(b)(2)(A) (1976 & Supp. I 1977). 430 U.S. at 128. As section 307(b) states that pretreatment standards apply to "categories of sources," *id.* §1317(b)(3) (1976), the Administrator is not required under du Pont to make any provision for variances from pretreatment standards.

45. Agreeing that a variance provision is not required, EPA asserts that the Administrator in his discretion may permit FDF variances from the pretreatment standards as an appropriate means to ensure that the categorical standards are not applied inequitably to a particular discharger. *See NRDC v. EPA*, 537 F.2d 642, 646-47 (2d Cir. 1976).[24] We need not consider whether

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23. *See* 33 U.S.C. §1311(c), (g), (h), 1326 (1976 & Supp. V 1981); 33 U.S.C.A. §1311(m) (West Supp. 1983); *see also* 33 U.S.C. §1317(b)(1) (Supp. I 1977).

24. The Supreme Court in *National Crushed Stone* has ascribed such a role to FDF variances from BPT effluent limitations:

> If a point source can show that its situation . . . is not within the range of circumstances considered by the Administrator, then it may receive a variance. . . . In such situations, the

the Administrator possesses the inherent authority to provide for variances from categorical pretreatment standards, however, because we find another of NRDC's contentions dispositive. NRDC, noting that the FDF variance provision is drawn to permit variances from pretreatment standards for toxic pollutants, argues that variances for toxic pollutants are forbidden by section 301(*l*) of the Act, 33 U.S.C. §1311(*l*) (Supp. I 1977). We agree.[25]

2. *Variances for Toxic Pollutants*

46. The elimination of the discharge of toxic pollutants has always received special emphasis under the Act. *Id.* §1251(a)(3) (1976); *see id.* §1362(13). In 1972 Congress directed the Administrator to list and develop effluent limitations for toxic pollutants under section 307(a) of the Act. *Id.* §1317(a). The discharge of toxic pollutants generated even greater congressional concern in 1977. *E.g.*, Senate Committee on Environment and Public Works, 95th Cong., 2d Sess., Legislative History of the Clean Water Act of 1977, at 326 (1978) (statement

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NOTE — *(Continued)*

> variance is an acknowledgement that the uniform BPT limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete.

National Crushed Stone, 449 U.S. at 77-78; *see Appalachian Power Co. v. EPA*, 671 F.2d 801, 809 (4th Cir. 1982); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1035 (D.C. Cir. 1978).

25. The Administrator has focused his efforts on regulating toxic pollutants, *see* 43 Fed. Reg. 27,761 (1978); *NRDC v. Train*, 8 Env't Rep. Cas. (BNA) at 2124 ¶4, 2126 ¶6, and apparently has not yet issued pretreatment standards for non-toxic pollutants. Consequently, we believe that the question of his inherent authority to issue FDF variances from pretreatment standards for non-toxic pollutants is not now ripe. *See generally Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967).

of Cong. Roberts) [hereinafter cited as "1977 Legis. Hist."]; *id.* at 454 (statement of Sen. Muskie). In section 53 of the 1977 Amendments, Congress itself added toxic pollutants to the Administrator's list and required that he promulgate BAT effluent limitations for those pollutants by 1980.[26] Section 53 also added subsection *(1)* to section 301:

> *(1)* The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

33 U.S.C. §1311*(1)* (Supp. I 1977).

47. EPA does not dispute that the pretreatment standards mandated by section 307(b) are a "requirement" of section 301.[27] Instead EPA argues that "modification" is a term of art in the Act, and that FDF variances are not modifications of a pretreatment standard but are simply the creation of a more appropriate standard based on factors previously overlooked by the Administrator. Under the Administrator's construction, section 301*(1)* deprives the Administrator only of his authority to "modify" BAT standards under section 301(c) and (g), 33 U.S.C. §1311(c), (g) (1976 & Supp. I 1977).[28]

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26. Pub. L. No. 95-217 §53(a), (b), 91 Stat. 1589-90 (amending 33 U.S.C. §1317(a) (Supp. I 1977)); *see also* H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 87, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4424, 4462.

27. *See* 33 U.S.C. §1311(b)(1)(A)(ii), (2)(A)(ii) (1976); *see also* H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 84, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4424, 4459.

28. Section 301(c) allows the Administrator to modify a direct discharger's BAT effluent limitation if the discharger can show that the modified standard he requests

> will represent the maximum use of [control] technology within the economic capability of the [direct discharger]; and will result in reasonable further progress toward the elimination of the discharge of pollutants.

48. The legislative history of section 301(*l*) does indicate that Congress was primarily concerned with prohibiting modifications under section 301(c) and (g).[29] Nonetheless, it does not appear that Congress used "modification" as a term of art so as to exclude variance provisions from the proscription of section 301(*l*). Spokesmen for the 1977 Amendments used the terms "waiver" and "modification" interchangeably. 1977 Legis. Hist. 328-29 (statement of Rep. Roberts); *id.* at 458 (statement of Sen. Muskie). More important, Senator Muskie termed section 301(c) a "variance" provision. 1977 Legis. Hist. 461. As "modification" is thus not a term of art, section 301(*l*) includes variances in its broad prohibition.

49. EPA's attempt to distinguish the policy behind FDF variances from the policies behind the "modification" provisions is equally unsuccessful. The Supreme Court has stated that section 301(c)'s modifications of BAT limits serve the same function as FDF variances of BPT limits:

> A §301(c) variance, thus, creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class.

NOTE — *(Continued)*

33 U.S.C. §1311(c) (1976). Section 301(g) requires the Administrator to modify a direct discharger's BAT effluent limitations with respect to the discharge of non-toxic pollutants if the discharger can show that the modified limit will not jeopardize compliance with BPT limits or interfere with the attainment of water quality goals. *Id.* §1311(g) (Supp. I 1977).

29. 1977 Legis. Hist. at 328-31 (statement of Rep. Roberts); *id.* at 458 (statement of Sen. Muskie); S. 1952, 95th Cong., 1st Sess. §26(a), (c) (1977); S. Rep. No. 370, 95th Cong., 1st Sess. 44, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4326, 4369.

National Crushed Stone, 449 U.S. at 74. If Congress was willing to prohibit section 301(c) modifications where toxic pollutants are concerned, it is difficult to imagine why Congress would have permitted similar FDF variances for those same pollutants.

50. In *Appalachian Power Co. v. Train*, 620 F.2d 1040 (4th Cir. 1980), NRDC argued that section 301(*l*) prohibited FDF variances from BPT effluent limitations for toxic pollutants. That court deferred to the Administrator's construction of the Act and upheld the FDF variance provision, remarking that "the best that can be said for §301(*l*) is that it is not clear." *Id.* at 1046-48. Because we find that section 301(*l*) is clear, we must disagree. Section 301(*l*) forbids modifications, and FDF variances are no less modifications than those provisions indisputably prohibited by that section. Given the clear congressional concern throughout the 1977 Amendments for discharges of toxic pollutants, we hold that FDF variances for toxic pollutant discharges are forbidden by the Act. We will therefore remand the FDF variance provision.

D. *The Removal Credits Provision*

51. Section 403.7 of the general pretreatment regulations establishes the criteria and procedures by which a POTW may revise an indirect discharger's numerical discharge limit for a pollutant, as set in its categorical pretreatment standard, to reflect the POTW's removal of that pollutant. 40 C.F.R. §403.7 (1982). Joint petitioners, Interlake and CACI argue that section 403.7 exceeds the Administrator's authority under section 307(b)(1) of the Act, is unworkable, and was improperly promulgated. We disagree, and will deny the petitions for review on this issue.

52. Section 307(b) of the Act authorized the Administrator to establish pretreatment standards for any

pollutant that "interferes with, passes through, or otherwise is incompatible" with POTWs. 33 U.S.C. §307(b)(1) (1976). In enacting that section Congress indicated that pretreatment of compatible pollutants may not be necessary, and added that pretreatment should not be required as a substitute for adequate treatment by POTWs.[30] In a further effort "to avoid treatment for treatment's sake," 1977 Legis. Hist. 343 (statement of Rep. Roberts), Congress in section 54(a) of the 1977 Amendments to the Act added a sentence to section 307(b)(1):

> If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 405 of this Act, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

Pub. L. No. 95-217 §54(a), 91 Stat. 1591 (amending 33 U.S.C. §1317(b)(1) (Supp. I 1977)). The legislative history of the section made clear that "[i]n promulgating national pretreatment standards the Administrator shall

30. S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 130, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3776, 3807; H.R. Rep. No. 911, 92d Cong., 2d Sess. 113, *reprinted in* 1972 Legis. Hist. 753, 800; *see* 1972 Legis. Hist. 233 (statement of Rep. Jones) (inefficient duplicative treatment not required).

include a provision recognizing the option of [a POTW] to modify the requirements to reflect the degree of reduction achieved by the treatment works." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 88, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4424, 4463.

53. In the removal credits provision the Administrator has set conditions and procedures for such revision of categorical pretreatment standards. 40 C.F.R. §403.7 (1982). To be eligible to grant revisions to reflect the toxic pollutants it removes, a POTW must first have a pretreatment program approved by the responsible Approval Authority.[31] *Id.* §403.7(b)(2).[32] The POTW must then obtain authorization from the Approval Authority to revise the discharge limits for specific pollutants. *Id.* §403.7(b)(1). To obtain authorization the POTW must demonstrate "consistent removal" of each pollutant sufficient to justify the proposed revision. *Id.* §403.7(b); *see id.* at 403.7(a)(1), (2). If once a year or more untreated

31. The Approval Authority for a POTW either is the head of its state water pollution control agency, if the state has an approved program to administer its own NPDES permits under section 402(b) of the Act, 33 U.S.C. §1342(b) (1976 & Supp. I 1977), or is the appropriate Regional Administrator of the EPA. 40 C.F.R. §§403.9(a), 403.3(c), (d), (e), (s) (1982); *see id.* §403.10; *see also id.* §403.7(f)(4), (g).

32. *Accord* 40 C.F.R. §403.8(a) (1982). A POTW's pretreatment program will be approved only if the POTW: (1) has the legal authority to apply and enforce the pretreatment requirements of §307(b) and (c) and the POTW reporting requirements of §402(b) of the Act; (2) has developed and implemented procedures to ensure compliance with the requirements of a pretreatment program; and (3) has sufficient resources and personnel to carry out its legal authority and procedures. *Id.* §403.8(f)(1)-(3). *See also id.* §403.9(g). The POTW's application must detail all this information. *Id.* §§403.8(f), 403.9(b). After notice and comment, the Approval Authority may approve a pretreatment program unless EPA objects. *Id.* §403.9(e), §403.11.

A POTW that has applied for pretreatment program approval and meets all other requirements may conditionally grant removal credits. *Id.* §403.7(b)(2).

wastewaters overflow before they reach the POTW and thus bypass the POTW's treatment process, the POTW either must show that its indirect dischargers compensate for the overflows, or it must reduce the amount of consistent removal claimed. *Id.* §403.7(b)(3); *see id.* §403.7(a)(3). The POTW must also show that the revision will not prevent it from meeting applicable sludge management requirements. *Id.* §403.7(b)(4). Once authorization for the revision has been granted, the POTW must monitor and report semiannually on its capability to remove the specified pollutants. *Id.* §403.7(f)(1); *see id.* §§403.7(d), 403.12(i), (j). If the Approval Authority determines that the discharge limit revision no longer meets the requirements of section 403.7, or is significantly contributing to a violation of the POTW's NPDES permit, the Approval Authority after an opportunity for corrective action may withdraw or modify the revision. *Id.* §403.7(f)(5).

1. *EPA Approval and Authorization*

54. Joint petitioners challenge the Administrator's authority under the Act to mandate that POTWs must have approved pretreatment programs before they may grant removal credits. *See id.* §403.7(b)(2). Joint petitioners first correctly observe that section 307(b)(1) does not expressly impose such a condition.[33] They then claim that the Administrator has improperly transplant-

33. Joint petitioners argue that because §307(b)(1) expressly conditions the grant of removal credits only on POTW removal of the pollutant, nonviolation of the POTW's effluent limit, and unimpeded sludge disposal, we should refuse to recognize any other conditions under the maxim *expressio unius est exclusio alterius*. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *Williams v. Wohlgemuth*, 540 F.2d 163, 169 (3d Cir. 1976). We cannot rely on that maxim, however, because there is persuasive evidence of a contrary legislative intent. *See Andrus v. Glover Constr. Co.*, 446 U.S. at 617.

ed that condition from section 402(b)(8) of the Act, 33 U.S.C. §1342(b)(8) (Supp. I 1977).

55. Section 402(b) sets the terms, conditions and requirements for permits issued under federal and state NPDES permit programs. *Id.* §1342(a)(3), (b) (1976 & Supp. I 1977). As amended in 1977, section 402(b)(8) authorizes the Administrator to insure that a POTW's permit includes conditions to require "a program to assure compliance with [section 1317(b)] pretreatment standards by each [significant] source" introducing regulated pollutants into the POTW. Pub. L. No. 95-217 §54(c), 91 Stat. 1591 (amending 33 U.S.C. §1342(b)(8) (Supp. I. 1977)). The amended section 402(b)(8) and the removal credits provision were both added by section 54 of the 1977 amendments, and the legislative history makes clear that the two provisions are closely related. The conference report and spokesmen in the House stated that the conferees had added the provision to allow a POTW to revise pretreatment standards to reflect removal "in applying these pretreatment standards through its pretreatment program." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 87, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4424, 4462; 1977 Legis. Hist. 342-43 (statement of Rep. Roberts); *id.* at 403 (statement of Rep. Anderson). Senator Muskie, the legislation's sponsor, informed the Senate that the new provision permitted POTWs to grant removal credits "[w]here a local compliance program is approved." 1977 Legis. Hist. 461. He explained:

> Tying local [removal] credits to local compliance programs not only provides an incentive for local participation, but more importantly, it provides assurance that the removal levels which justified the local credits will be maintained by a publicly-owned treatment works committed to a sound pretreatment program.

Id. at 462. In light of this persuasive legislative history,[34] we believe that the Administrator may require an approved pretreatment program as a condition upon a POTW's grant of removal credits.

56. Petitioner CACI, emphasizing that Congress in section 307(b)(1) authorized POTWs, not EPA, to grant removal credits, claims the Administrator may not require that POTWs obtain his authorization for each proposed removal credit. There is support, however, for such an authorization requirement in the legislative history. Senator Muskie stated that "EPA and the [states issuing NPDES permits] may approve case-by-case modifications of the national pretreatment standards," and listed several conditions the EPA might place on its authorization. 1977 Legis. Hist. 461. Moreover, the Administrator's authorization fits within the scheme of the Act as established by section 54 of the 1977 Amendments. As noted above, the Administrator may require that a POTW seeking to grant removal credits have an approved pretreatment program to assure compliance by its indirect dischargers with the section 1317(b) pretreatment standards. Section 54 also allowed the Administrator to bring an action to compel the POTW to enforce the pretreatment standards under its program. Pub. L. No. 95-217 §54(b), 91 Stat. 1561 (adding 33 U.S.C. §1319(f) (Supp. I 1977)). Together those provisions endow the Administrator with the power to deny

34. Joint petitioners argue that Senator Muskie's statements conflict with the conference report and with the Act, and are thus entitled to little weight. First, we see no conflict between Senator Muskie's statement and the words of the conference report and of §402(b)(8). Second, although we recognize that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), we must look to the sponsors of legislation when the meaning of the words of the enactment, and of the conference report, are in doubt, *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 640 (1967).

authorization to a POTW's dispensation of removal credits. CACI acknowledges that power, but argues that the Administrator must set the conditions on his authorization by litigation rather than regulation. *See Air Reduction Co. v. Hickel*, 420 F.2d 592 (D.C. Cir. 1968). We find it hard to believe that Congress required such a piecemeal approach. *See Weinberger v. Hyson, Westcott & Dunning, Inc.*, 412 U.S. 609, 624-26 (1973). Section 501(a) of the Act empowers the Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter." 33 U.S.C. §1361(a) (1976); *see du Pont*, 430 U.S. at 132; *see also* 33 U.S.C. §1251(d) (1976). Since such regulations would not deprive POTWs of the sole ability to grant, and the ultimate power to deny, removal credits, we conclude that under section 501(a) the Administrator may express the conditions on his authorization of removal credits in binding regulations.

2. *Unworkability*

57. Petitioners place more emphasis on their contention that the removal credits provision is simply unworkable. Joint petitioners raise two specific defects that they claim render the provision unworkable. First, they attack section 403.7(f)(5), which permits the Administrator to withdraw or modify removal credits if semiannual data reveals that the POTW issuing the credits is no longer attaining its predicted removal. Joint petitioners say that due to section 403.7(f)(5) they will be unable to rely on their removal-revised discharge limits and will be forced to install just as much control technology as if there were no removal at all. We agree with EPA, however, that such withdrawn or modified discharge limits, though unfortunate, are merely the recognition of the POTW's failure to remove the pollutant. By requiring such modifications, the Administrator prevents the granting of removal credits for toxic pollutants

which the POTW simply discharges into navigable waters. Such a requirement is consistent with the mandate of section 307(b)(1) that any revision "reflect the removal of such toxic pollutants by such works." 33 U.S.C. §1317(b)(1) (Supp. I 1977). It is also consonant with the legislative history requiring "documented pollutant removals" and "a demonstration that the pollutant is degraded or treated," 1977 Legis. Hist. 461 (statement of Sen. Muskie).

58. Second, joint petitioners challenge the requirement in section 403.7(b)(3) that a POTW unable to prevent toxic overflows must reduce the amount of removal claimed in proportion to the number of hours of overflow. Joint petitioners claim that POTWs will be unable to make verifiable engineering estimates of the hours of overflow, and will thus be unable to grant removal credits. As the Administrator notes, however, section 403.7(b) simply implements the statutory requirement that removal credits be granted only for pollutants actually removed by the POTW. Moreover, a POTW unable to estimate the time, let alone the amount, of untreated wastewater overflow may not be able to accurately predict the proportion of pollutants which it will remove. Requiring such an estimate thus has a rational basis under the Act.

59. Joint petitioners and Interlake also make a generalized claim that the removal credits provision is unworkable. Such a generalized claim is necessarily less persuasive than a claim detailing the alleged errors made by the Administrator. We have nonetheless reviewed the bases cited by petitioners for the claim of unworkability. We find nothing in those sources that would cause us to invalidate the regulations as unworkable.[35] Joint petitioners have thus failed to document their general assertion so as to overcome the presumption of regularity in the Administrator's conduct. We are accordingly not convinced that the regulations can be declared arbitrary and capricious as

35. First, petitioners cite comments submitted by POTWs during the rulemaking proceeding on the 1981 general pretreatment amendments. Only one of the commentators cited asserts that the removal credit provision is unworkable, and it does so based largely on the specific "defects" dealt with above. Its remaining contentions are, first, that it would have to set separate local pretreatment requirements for each of its POTWs because each has a different removal percentage, and, second, that in granting removal credits to the numerous indirect dischargers seeking removal credits it will have to spend thousands of man-hours preparing thousands of reports. App. at 397-98 (Comments of Metropolitan Sanitary District of Greater Chicago). Those contentions raise nothing rendering the provision invalid.

Second, joint petitioners cite the report of a congressional oversight committee. Subcommittee on Oversight and Review of the Committee of Public Works and Transportation, House of Representatives, 96th Cong., 2d Sess., Implementation of the Federal Water Pollution Control Act 42, 59 (Comm. Print 1980). The subcommittee did note the reluctance of POTWs to grant removal credits due to the complexity of the regulations, and stated that such reluctance would result in duplicative [illegible] control capabilities contrary to the intent of the 1977 Amendments. The subcommittee did not point to any specific part of the removal credit provision as being unworkable, however. In any case, the views of a single subcommittee, not engaged in the formulation of legislation, regarding the intent of a prior Congress are not entitled to great weight. *See Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 116 (1980); *First State Bank v. United States*, 599 F.2d 558, 563 n.3 (3d Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

Third, joint petitioners cite a 1982 GAO report. That report, however, was issued after the 1981 amendments became effective and is necessarily outside the administrative record. *FPC v. Transcontinental Gas Pipe Line Co.*, 423 U.S. 326, 331-34 (1976).

Finally, joint petitioners cite the Administrator's own proposed regulations to revise the removal credits provision. 47 Fed. Reg. 42,698 (1982). In his proposal the Administrator stated that the proposal was his attempt to make the removal credits provision simpler, clearer and more workable, *id.*, but he did not state that the existing provision is unworkable.

"unworkable." *See AISI I*, 526 F.2d at 1049, 1064.[36] Accordingly, the petitions for review will be denied as to this issue.

E. *The Combined Wastestream Formula*

30. In the general pretreatment regulations, section 403.6(e) establishes a formula to adjust the discharge limit set by a categorical pretreatment standard where the wastestream regulated by that pretreatment standard is combined with other wastewaters prior to pretreatment by the indirect discharger. 40 C.F.R. §403.6(e) (1982). Petitioner Ford, along with joint petitioners, argues that the very concept of such a formula is inconsistent with the structure of the Act. Joint petitioners, Interlake and GM argue that because the standards for a combined wastestream will change each time EPA regulates a process which contributes to the stream, the formula will lead to an arbitrary and capricious "moving target." Those petitioners also contend that the formula is invalid because EPA failed to consider the cost and feasibility of treating such combined wastestreams. Interlake makes that argument with reference to the iron and steel industry, and also contends that the formula is void for vagueness. Finally, GM asserts that the formula was improperly promulgated. Given our construction of the formula, however, we find nothing in those challenges that requires the invalidation of the formula.

36. Joint petitioners also claim that the Administrator failed to respond to significant comments. They point to one commentator's assertion that §403.7(f)(5) results in a shifting standard, the same commentator's complaint that each of its POTWs would have a separate local pretreatment requirements because of different removal rates, J. App. at 397, and the "chorus" of comments that the removal credits are unworkable. As we have been able to discern the rational basis of the Administrator's actions regarding those comments, we see no reason to remand.

61. Section 307(b) of the Act directs the Administrator to regulate discharges, not pollutant by pollutant, but by categories of sources. 33 U.S.C. §1317(b)(3) (1976). The Administrator establishes such categorical pretreatment regulations by "specific industrial subcategories." 40 C.F.R.§403.6 (1982); *see* 42 Fed. Reg. 6476 (1977). The Administrator has established such industrial categories by the process or operation used, rather than by the overall nature of an industrial facility. *E.g.*, 40 C.F.R. §413.01(a) (1982) (applicable to "electroplating operations"); *id.* §420.01(a) (applicable to "production operations in the Iron and Steel Point Source Category"); *see* 46 Fed. Reg. 9419 (1982). Consequently, it is possible for a diversified industrial facility to have several different processes producing different wastestreams that are not regulated by the same categorical standard, or are not regulated at all. *Id.* Such a facility may segregate the wastestreams from each process and separately pretreat them, or it may combine some or all of its wastestreams prior to pretreatment (an "integrated" facility). *See id.* Similarly, an industrial facility may discharge diluting streams, such as cooling water, that it could segregate from or combine with its regulated wastestreams before pretreatment. The combination of streams obviously complicates the task of setting categorical pretreatment standards. As the Administrator has recognized, however, "[s]eparate treatment of wastes at an integrated plant can be costly, wasteful of energy, inefficient and environmentally counterproductive." *Id.* at 9420.

62. The difficulty of establishing national pretreatment standards for the universe of industrial sources is compounded by the way in which the level of pollutants in a discharge is measured. For most pretreatment standards the Administrator has decided to set numerical limits on the concentration of pollutants in

the discharge.[37] Of course, the concentration of pollutants in a wastestream can be reduced without actually reducing the amount of pollutants discharged simply by adding water.[38] At the same time, however, the pretreatment of non-regulated, diluting wastestreams mixed with regulated streams may remove pollutants from the non-regulated streams that would otherwise go without pretreatment. 46 Fed. Reg. 9420 (1981).

63. The Administrator has attempted to strike a balance between those considerations by promulgating the combined wastestream formula. *Id.* The formula, applied when the wastestream from a regulated process is mixed prior to pretreatment with other wastewaters, derives from the numerical limit for the regulated wastestream an equivalent limit for the combined stream, weighted to reflect the relative flows of the contributing wastestreams ("flow-weighted"). As originally explained in the Administrator's National Pretreatment Strategy, and as later proposed for promulgation, the formula assumed that there was only one regulated process contributing to the combined stream, and that the non-regulated stream(s) contained no pollutants. *Id.*; *see* 44 Fed. Reg. 62,266 (1979); 43 Fed. Reg. 27,762 (1978). After receiving substantial public comment the Administrator recognized that those assumptions made combined pretreatment of wastestreams impracticable "by creating combined stream limits that were technically unattainable in most instances." 46 Fed. Reg. 9420 (1981). The Administrator promulgated a revised formu-

37. *E.g.*, 40 C.F.R. §413.14 (1982) (milligrams of pollutant per liter of water); *see* 43 Fed. Reg. 27,743-44 (1978).

38. Congress expressed concern that dilution not be used to substitute for pretreatment. S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 101, *reprinted in* 1972 U.S. Code Cong. & Adm. News 3776, 3778; *see* H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 87, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4424, 4462. The Administrator has incorporated a prohibition of dilution in the general pretreatment regulations. 40 C.F.R. §403.6(d) (1982).

la "to minimize the need for separation of wastestreams" while protecting against dilution. *Id.* Under the promulgated formula an alternative discharge limit is derived for the combined wastestream by considering the flow-weighted categorical concentration limit of each regulated stream, as well as the flow of any "dilute" streams. 40 C.F.R.§403.6(e)(1)(i) (1982).[39] The formula has three basic effects. *See* 46 Fed. Reg. 9477 (1981). First, if a regulated stream is combined with a dilute stream, the concentration limit for the regulated pollutant becomes more stringent in proportion to the dilution. Second, if a regulated stream is combined with another regulated stream with different concentration limits for the same pollutant, the concentration limit for the regulated pollutant in the combined stream will be somewhere in between the two limits, in proportion to the flows and limits of two regulated streams. Third, if a regulated stream is combined with an non-regulated but non-dilute stream (an "unregulated" stream), the concentration limit for the regulated pollutan in the combined stream stays unchanged. Of course, if more than one of these combinations occurs, the effects are also combined.

64. We note at the outset that behind the promulgated formula's three effects lie three assumptions. First, the formula assumes that dilute streams as defined in 40 C.F.R§403.6(e) (1982) are free of the regulated pollutant. 46 Fed. Reg. 9421 (1982). Second, the formula presumes that two regulated streams are just as pretreatable combined as they are segregated — that is, that they do not interfere with each other's pretreatment

39. "Dilute" streams under the formula are restricted to boiler blowdown streams, non-contact cooling streams, sanitary wastestreams not regulated by categorical standards, and any process wastestreams entirely exempt from categorical standards because the pollutant in question is present in small quantities. 40 C.F.R. §403.6(e)(1)(i), (ii) (1982); *see NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) at 1842-43 n.8.

processes. Third, the formula assumes that unregulated streams are just as pretreatable as regulated streams.

1. *Process Categories*

65. Ford makes an assertion which, though raised in the context of the categorical electroplating regulations, would undermine the basic rationale advanced for the combined wastestream formula as applied to most indirect dischargers. Ford, with joint petitioners, contends that Congress intended that the Administrator regulate *whole plants*, not operations or processes, by industrial category. Thus, Ford asserts, the Administrator must regulate an integrated automobile manufacturing plant that combines its wastestreams before pretreatment, not by establishing separate categorical standards for its electroplating, rubber processing, iron and steel, etc., operations and then using the formula to create an alternative discharge limit for the combined stream, but by promulgating a single pretreatment standard for the facility, without any use of the formula. Ford analogizes to diverse though tangential sources to show that Congress intended that the Administrator was to regulate whole plants, but refers us to nothing which indicates that a whole plant can be subjected to only one categorical standard no matter how many processes are employed.[40] Absent some indication that this was Congress'

40. Ford first claims that Congress used the term "source" interchangeably with the term "industrial user." *See id.* §§1284(b)(2), 1342(b)(9). "Point source" and "industrial user" are separately defined, however, and as defined "point source" would permit several "sources" in a single facility. *Id.* §1362(14), (18).

Ford next notes that the legislative history of the 1977 Amendments to §307(a) approved the promulgation of BAT standards "on an industry-by-industry basis." 1977 Legis. Hist. at 327 (statement of Rep. Roberts); *id.* at 455 (statement of Sen. Muskie). The language of that section mandates regulation by "category or class of point sources," however. 33 U.S.C.§1317(a)(2), (5) (1976 & Supp. I 1977).

intent, we will defer to the Administrator's interpretation.

2. *Moving Target*

66. Joint petitioners, GM and Interlake put more emphasis on their assertion that the Administrator's power to promulgate pretreatment standards for each process does not allow him to impose such standards one by one on a single facility. Petitioners correctly point out that each time an unregulated contributing stream becomes regulated, application of the formula will change the combined wastestream's alternative discharge limit. Petitioners urge that as a result their facilities will be required to adjust to a "moving target," denying them finality and rendering the planning and construction of control technology impossible. EPA argues that the moving target is not the fault of the formula, but is inevitable where an agency of limited resources must promulgate standards for numerous categories which must also apply to integrated facilities.

Third, Ford cites §306(b)(1)(A), which lists categories of new sources in broad industrial groups. 33 U.S.C.§1316(b)(1)(A) (1976); *see id.* §1317(c). That section permits the Administrator within each industrial category to distinguish among classes and types of sources considering the type of process used, however. *Id.* §1316(b)(2); *see* 1972 Legis. Hist. 259 (statement of Reg. Wright).

Finally, Ford notes that the *NRDC v. Train* consent decree mandates that in setting categorical pretreatment standards "[t]he scope of point source coverage of each listed category is determined by the Standard Industrial Classification ("SIC") Code number or numbers which are set forth . . . for each industrial category." 8 Env't Rep. Cas. (BNA) at 2125 ¶5; *see id.* at 2130-36; 43 Fed. Reg. 27,760, 27,771-73 (1978). Ford claims that such SIC Codes treat integrated facilities as a unit. The consent decree has since been modified to reshuffle the originally-designated industrial categories and to dispense with the SIC Codes, however. *NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) at 1841-42; *see* 46 Fed. Reg. 9405, 9459 (1981).

67. We agree with petitioners that the "moving target" is not an inevitable dilemma but is the result of the Administrator's choice to regulate process-by-process rather than by a method which treated each industrial facility as an indivisible unit. *See also* 33 U.S.C. §1317(b)(1) (1976) (directing promulgation of pretreatment standards within 270 days). The Administrator's choice may well affect the costs and attainability of each categorical standard imposed on integrated indirect dischargers, and the Administrator must take such effects into account. We do not believe, however, that the existence of the moving target problem necessarily renders the Administrator's choice, and the combined wastestream formula, arbitrary, capricious or an abuse of discretion. The Administrator must regulate a vast array of indirect dischargers within the periods specified in the Act. The regulation of the variety of integrated facilities combining wastestreams of diverse character inevitably complicates the Administrator's task. Although petitioners offer several approaches the Administrator might have adopted,[41] we cannot substitute our judgment for that of the Administrator. The process-by-process or "building block" approach may make up in relative simplicity and uniformity what it lacks in predictability.[42] We cannot say that that approach, or the formula that implements it, lacks a rational basis.[43]

41. Joint petitioners suggest that the Administrator could have regulated integrated facilities industry-by-industry or plant-by-plant, or could have regulated each integrated facility under the process category best suited to it. GM suggests instead that individual integrated facilities go unregulated until all applicable process standards are promulgated.

42. Joint petitioners complain that because of the formula's moving target, the categorical standards will give inadequate notice of what compliance is required. We do not believe, however, that the problem of notice thus presented to integrated facilities is any more severe than for segregated facilities to which a series of categorical standards are applied. In any case, such problems are peculiar to the individual categorical standard and can be raised in more concrete form in each standard's rulemaking proceedings.

43. GM argues that because the formula proposed in 1979 had no moving target problem and required segregation in most instances, it provided inadequate notice of the formula ultimately promulgated. We agree with EPA that the proposed formula fairly apprised the affected parties of the subjects and issues raised by the formula, and that the promulgated formula was simply a reaction to the comments received. *See AISI II*, 568 F.2d at 293; *see also BASF Wyandotte*, 598 F.2d at 642-44.

3. *Attainability and Cost of Combined Pretreatment*

68. Joint petitioners, Interlake and GM also contend that in promulgating the formula the Administrator must consider the pretreatability of combined wastestreams, and the cost of such pretreatment. They note that if a combined wastestream does not fit the formula's assumptions,[44] the formula-generated alternative discharge limit may be unattainable or more costly. If the Administrator has failed to consider the effluent reduction attainable or the cost, they argue, then the alternative discharge limits generated by the formula are invalid. They claim that as a result the formula itself is arbitrary and capricious.

69. Section 304(b) of the Act directs the Administrator in setting BPT and BAT limits to "identify . . . the degree of effluent reduction attainable through the application" of the control technology, and to consider the cost of applying that technology. 33 U.S.C. §1314(b)(1).

44. Petitioners point out, first, that even as defined in §403.6(e) dilute streams may themselves contain pollutants. Second, they note that as-yet-unregulated streams containing the regulated pollutant may not be treatable to the same degree as the regulated stream. Third, they raise the possibility that the pollutants in the combined streams may impede the control technology used for the regulated stream. Finally, they argue that the formula wrongly assumes a constant flow from regulated processes contributing to the combined stream.

GM contends that the Administrator did not respond to significant comments raising the last-mentioned difficulty. *See* app. at 565 (comments of Ford). Because we conclude that the problem is best resolved in the applicable categorical rulemaking, we need not address GM's contention.

(2) (1976). Section 306(b) of the Act requires the Administrator to consider the same factors in setting BDT. *Id.* §1316(a), (b). When the Administrator sets pretreatment standards using the BPT, BAT, or BDT levels of technology, he must consider those statutorily-relevant factors for the wastestreams he regulates, whether they are segregated or combined. *See generally AISI II*, 568 F.2d at 304-05. Thus, the Administrator at some point must consider the effluent reduction attainable by pretreatment of combined wastestreams, and the cost of attaining that reduction.[45]

70. EPA admits that in promulgating the combined wastestream formula the Administrator "did not consider — in fact could not have taken into account — every relevant factor for every category." Brief for Respondent (No. 79-2256) at 78; *see* 46 Fed. Reg. 9422 (1982) (stating insufficiency of data). EPA urges instead that the questions of the attainable effluent reduction and the attainment cost of combined wastestreams "are best addressed in the individual categorical rulemaking" which sets the numerical discharge limits that are inserted into the formula. Brief for Respondant (No. 79-2256) at 78. Consequently, EPA argues that those questions are not ripe for judicial review after the promulgation of the combined wastestream formula, but must be considered

45. When faced with the task of considering the cost and attainability of pretreating a regulated wastestream mixed into a combined wastestream, the Administrator has several options in setting BPT, BAT, or BDT levels of technology. He could find segregated pretreatment to be the best technology, and determine the cost and feasibility of segregating the regulated wastestream from combined stream and separately pretreating the regulated stream. He could find combined pretreatment to be the best technology, and consider the cost and attainability of pretreating the combined stream. Indeed, if the Administrator chose combined pretreatment as the best technology but found its cost and attainability indeterminable, he could choose to use the cost and attainability of segregated pretreatment as a determinable surrogate for the cost and attainability of combined pretreatment.

only in reviewing the categorical standards applicable to combined wastestreams.

71. To determine whether a challenge to an administrative regulation is ripe for review,

> a two-fold inquiry must be made: first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied at that stage.

Toilet Goods Association v. Gardner, 387 U.S. 158, 162 (1967); *see Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-56 (1967). Applying that test, we believe that the issues raised by petitioners are not ripe for review.

72. First, the issues are not appropriate for judicial resolution in our review of the formula itself. We cannot determine whether the Administrator has properly considered the attainable effluent reduction and attainment cost of a combined wastestream's alternative discharge limit until that limit has been generated by the formula. The formula cannot generate an alternative limit for the combined wastestream until the Administrator promulgates a categorical standard setting numerical discharge limits for one or more of the process wastestreams contributing to the combined stream. Thus, the promulgation of a categorical standard provides "further factual amplification" necessary to decide the attainability and cost of an alternative discharge limit. *Hooker Chemical Co. v. EPA*, 642 F.2d 48, 52 (3d Cir. 1981).[46] It is only in our review of such categorical standards that we can resolve petitioners' claims.

73. Of course, once the Administrator promulgates a categorical standard applicable to a process stream contributing to a discharger's combined stream, the is-

46. Moreover, while the formula is itself "final," it does not generate final, enforceable alternative discharge limits until a categorical standard is promulgated. *See Abbott Laboratories*, 387 U.S. at 147, 149-52.

sues become appropriate for judicial resolution. Each such standard, by setting a new numerical discharge limit on the contributing stream, will result in a new alternative discharge limit for the combined stream. Because that alternative limit is then enforceable against the discharger, *see* 46 Fed. Reg. 9420 (1982), it must be based on a consideration of the relevant factors, including attainability and cost. Dischargers petitioning for review of the categorical standard may then argue that the Administrator failed to consider the cost and attainability of the alternative discharge limit, and the courts can resolve their claims.

74. Second, we do not believe that petitioners will suffer hardship if we now deny judicial review of their contentions. As noted above, petitioners will be able to seek review of the Administrator's consideration of attainability and cost each time the Administrator promulgates a categorical standard resulting in a new alternative discharge limit generated by the formula. They may then argue that that alternative limit is not based on a consideration of those relevant factors.[47] Until such categorical standards are promulgated, no enforceable alternative limit exists and the impact on the petitioners is not "sufficiently direct and immediate." *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 522 (3d Cir. 1976) (quoting *Abbott Laboratories*, 387 U.S. at 152). As to future categorical standards, then, petitioners' arguments are merely postponed to another day.[48]

47. Joint petitioners argue that it violates the requirement of rulemaking to promulgate a formula requiring pretreatment of an as-yet-unregulated wastestream. The Administrator disagrees, stating an industry combining regulated and unregulated wastestream has the option of segregating and providing separate pretreatment of regulated and unregulated steams. 46 Fed. Reg. 9422 (1982). We agree with the Administrator, save that he must of course consider the costs of such segregation in setting the categorical standard for the regulated stream.

48. Joint petitioners argue that they will be harmed even if they can contest the alternative discharge limits generated in the future by the formula. They claim that if the formula goes unchallenged now the resulting uncertainty will prevent them from building for future pretreatment. Whatever formula is adopted, however, the alternative discharge limits it generates for combined streams will be uncertain until the categorical limits for the contributing streams have been promulgated.

75. Petitioners claim, however, that without judicial review of the formula they will suffer hardship because they are subject to already-promulgated categorical standards. Interlake contends that in promulgating the new Iron and Steel Manufacturing categorical pretreatment regulations, 40 C.F.R. §§420.01-.127 (1982), the Administrator failed to consider the attainability or cost of the alternative discharge limits generated by the combined wastestream formula. *See* 47 Fed. Reg. 23,267 (1982).[49] Similarly, Ford challenges the Administrator's consideration of cost and attainability of combined pretreatment in promulgating the electroplating standards.

76. EPA argues that the challenges to the attainability and cost of the alternative discharge limits generated using the electroplating and iron and steel manufacturing pretreatment standards cannot be addressed in our review of the formula, but must be raised in the review of those categorical standards. First, EPA notes that Interlake is presently seeking review of the iron and steel standards in this court. *National Steel Corp. v. EPA*, Nos. 82-3225 et al. (3d Cir. filed June 10, 1982). EPA states that Interlake may raise its challenge in those cases. Brief for Respondent (No. 79-2256) at 93. Similarly, EPA asserts that Ford must press its arguments in its appeal from the denial of its petition to reconsider the categorical electroplating standards. *See*

49. Interlake argues that the formula may generate unattainable limits because "dilute streams" in the iron and steel industry are not pollutant-free, as assumed by the formula, but contain ammonia.

Interlake also charges that the Administrator failed to consider the cost and feasibility of flow-monitoring for the combined streams.

Ford Motor Co. v. EPA, ____ F.2d ____ (3d Cir. 1983). EPA adds that if relief is warranted in those cases, the proper remedy would be the vacation of the categorical standards, not of the combined wastestream formula.

77. We agree with EPA that Interlake's challenges to the formula-generated alternative discharge limits for the iron and steel industry can be raised in our review of the categorical standards for iron and steel manufacturing. Similarly, we agree that Ford can challenge the alternative discharge limits for the electroplating industry in its appeal from the denial of its petition for reconsideration of the categorical electroplating standards. Those petitioners will then have the opportunity to question whether the Administrator properly considered the cost and attainability of those alternative limits. Because Interlake and Ford thus will not suffer hardship by our failure to review their challenges to the formula itself, we conclude that their challenges are not now ripe. We will therefore deny their petitions for review of the formula.

III. THE CATEGORICAL ELECTROPLATING STANDARDS

78. The categorical pretreatment regulations establish numerical limits, based on BPT-level technology, upon the discharge of certain pollutants by electroplating operations. 40 C.F.R. §§413.01-.84 (1982). Petitioners make several challenges to these standards. First, Ford contends that the methodology behind the pretreatment standards is fatally flawed. Second, NAMF contends that the standards are not economically achievable for job shops and are thus arbitrary and capricious.[50] Third, GM asserts that the June 30, 1984

50. In addition, NAMF argues that the electroplating standards should be set aside because of defects in the general pretreatment standards. First, NAMF asserts that without a workable removal credits provision to prevent redundant treatment, the electroplating standards cannot stand. Second, NAMF contends that because the combined wastestream formula is arbitrary and subjects electroplaters to a moving target, it should not be applied to them. As we have considered and rejected those arguments in denying the petitions for review of those two provisions, we decline NAMF's invitation to set aside the electroplating regulations on those grounds.

NAMF also argues that the definitions of "interference" and "pass through" are invalid and undermine the electroplating standards. We agree that the definitions are invalid. However, the definitions play no part in either the setting or the administration of the categorical pretreatment standards. We can therefore see no reason why their invalidity should affect the validity of the electroplating standards.

compliance date for integrated electroplaters is arbitrary and capricious.

A. *Methodology of the Standards*

79. Ford contends that the Administrator has improperly calculated the discharge limits attainable using BPT. We disagree, and will deny Ford's petition for review.

80. In promulgating the electroplating standards the Administrator has adopted the BPT level of technology from section 301(b)(1)(A), 33 U.S.C. §1311(b)(1)(A) (1976). The requirements for determining BPT limits are set forth in section 304(b)(1), which directs the Administrator to "identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources." 33 U.S.C. §1314(b)(1) (1976). The stringency required by BPT is indicated in the legislative history:

> The Administrator should establish the range of "best practicable" levels based upon the average of the best existing performance by plants of various

sizes, ages, and unit processes within each industrial category.

1972 Legis. Hist. 170 (statement of Sen. Muskie); *see* S. Rep. No. 414, 92d Cong., 1st Sess. 50, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3716.[51] Unless the present practices of all sources in the category are "uniformly inadequate," 1972 Legis. Hist. 169-70 (statement of Sen. Muskie), "the average of the best" is a measure of BPT. *Hooker Chemical & Plastics Corp. v. Train*, 537 F.2d 620, 633 (2d Cir. 1976); *American Meat Institute v. EPA*, 526 F.2d 442, 453 (7th Cir. 1975); *see National Crushed Stone*, 449 U.S. at 76 & n.15; *AISI I*, 526 F.2d at 1057.

81. To set the BPT electroplating standards the Administrator first determined the pollutants of concern, e.g., cadmium, lead, cyanide, hexavalent and trivalent chromium, copper, nickel, and zinc. After determining the BPT pretreatment technology used by the average of the best plants, the Administrator used his sampling data[52] to determine the effluent reductions achievable by such plants using that technology. The Administrator first derived a "long-term average effluent concentration" for each regulated pollutant, which represented the expected effluent concentration attainable over a year or more by using the best practicable technology. Because even plants using the best practicable technology experience routine fluctuations in their effluent concentration, the Administrator calculated "variability factors" representing the percentage increase normally occurring during one- and thirty-day periods. The Administrator then multiplied the long-term concentration average by the respective variability factors to obtain the one- and thirty-day pretreatment standards for each pollutant he regulated.

51. For BAT, by contrast, the legislative history indicates that the range of levels established should instead "at a minimum be referenced to the best performer in any industrial category." 1972 Legis. Hist. 170 (statement of Sen. Muskie); S. Rep. No. 414, 92d Cong., 1st Sess. 50, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3717.

52. The Administrator contacted 542 plants, of which 196 returned data adequate for complete analysis. The Administrator then visited 82 of the most promising plants in order to verify the submitted data. J. App. at 1034-36.

82. Ford challenges the data and methodology used by the Administrator in his calculations. Under the arbitrary and capricious standard our deference to the agency is greatest when reviewing technical matters within its expertise. In particular, the choice of scientific data and statistical methodology to be used is best left to the sound discretion of the Administrator. *See BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 655 (1st Cir. 1979); *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1036 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); *FMC Corp. v. Train*, 539 F.2d 973, 986 (4th Cir. 1976); *American Meat Institute*, 526 F.2d at 457.

1. *The Regression Analysis*

83. Ford first questions the Administrator's method of calculating the long-term average effluent concentration for pollutants other than cyanide and hexavalent chromium. For those two pollutants, the Administrator was able to base the long-term averages directly on empirical data from the average of the best plants. For copper, nickel, zinc, total (hexavalent plus trivalent) chromium, lead, and cadmium, however, the Administrator employed a multiple regression analysis, using three variables believed to be significantly related to the concentration of the regulated pollutant in the effluent: the concentration in the influent of the regulated Metal ("Me°"); the concentration in the influent of all Precipitable Metals ("PM"); and the concentration in the effluent of the Total Suspended Solids ("TSS"). J. App. at 1346. The Administrator simplified his equation by using the ratio of Me° over PM, called Xme. *Id.* at 1347.

Finding that electroplaters using adequate pollution control could attain an average TSS of 25 mg/l and achieve an Xme equal to that of the 75th percentile of sampled firms, the Administrator then derived long-term averages for the regulated pollutants. *See id.* at 1357-65.

84. Ford first claims that a regression analysis using TSS and Xme explains very little. The Administrator thoroughly explained his use of the regression analysis and of TSS and Xme, and analyzed their predictive value, however. *Id.* at 1346-57, 1398.[53] Ford also attacks as unattainable the values assigned to Xme and TSS. We believe, however, that both the assigned values are clearly attainable by the average of the best plants: the 75th percentile figure for Xme was already being met, by definition, by 75% of the sampled plants, and the 25 mg/l TSS figure was above that observed for the plants using BPT.[54]

85. Ford next challenges the Administrator's computation of the variability factors. Because neither Ford nor any other commentator criticized the Administrator's variability approach during the rulemaking leading to the 1979 standards, Ford has less leeway in demonstrating the invalidity of that approach. Ford questions both the Administrator's choice of data and his use of the

53. Ford correctly points out that because Xme is a ratio of the regulated metal to all metals, an electroplater discharging only one metal will never have an Xme of less than one. The Administrator recognized that, however. He stated that the addition of unregulated precipitable metals may serve to coagulate and help precipitate the regulated metal. J. App. at 1358, 1850. He also stated that a separate analysis indicated that single-metal electroplaters would be able to meet the standard for the regulated pollutant set using Xme. J. App. at 1364-65; 44 Fed. Reg. 52.609 (1979).

54. Ford questions the Administrator's decision to use TSS and Xme data from only some of the plants EPA visited, but fails to address the criteria used by the Administrator to distinguish between the adequacy of treatment at the visited plants. *See* J. App. at 1357-58.

median variability factor. We see nothing in Ford's criticisms that satisfies its burden.

2. *Lead and Cadmium*

86. Finally, Ford claims that, in contrast to the other pollutants for which the Administrator used the regression analysis, the lead and cadmium discharge limits are totally unsupported.[55] For copper, nickel, zinc, and total chromium, the Administrator had had adequate data on the influent and effluent concentrations of each pollutant to determine individualized coefficients in the regression equation. Those coefficients, different for each pollutant, served to ensure the "best fit" for each pollutant's long-term average. J. App. at 1347-49, 1359. For lead and cadmium, however, the Administrator recognized that he had inadequate data to derive individualized coefficients. Having computed a "group average" of the coefficients determined for copper, nickel, zinc, and total chromium (expressed in his Equation 7), J. App. at 1347, 1349-50, the Administrator stated:

> Because of the small number of plants plating [cadmium] or discharging [lead], it is not feasible to develop best fit equations for these metals. However, Equation [7] predicts, quite well, the discharge concentrations of the metals for which adequate data were available. Therefore, this equation is used to derive average [cadmium] and [lead] limits as well.

55. We can find no indication that any comments during the rulemaking called the Administrator's attention to the lack of data behind the lead and cadmium limits. We note, however, that the Administrator was nonetheless aware of the problem. Indeed, given its centrality to his efforts to set limits for those pollutants, the lack of data could hardly have been overlooked. *See AISI I*, 526 F.2d at 1050. In any case, EPA does not argue that Ford should be barred from raising the problem because of any failure to raise it before the Administrator.

J. App. at 1359, 1361 (reference and footnote omitted). The Administrator then adopted the average of the coefficients of the four metals as the coefficients for lead and for cadmium. In other words, the Administrator chose to predict the treatability of lead and cadmium using data from other metals, explaining only that the data predicted well the treatability of those other metals.

87. Ford correctly notes that nothing in the Administrator's statement explains why the data for the four metals will predict well the treatability of lead and cadmium. We can reasonably discern, however, that the Administrator found lead and cadmium to be equally as treatable as the other metals. Ford has failed to rebut that implicit assumption, for it has never demonstrated, either in the administrative record or before us, that lead and cadmium are not equally treatable.

88. We note, moreover, that the Administrator buttressed his conclusion using what data he possessed on lead and cadmium. *See Weyerhaeuser*, 590 F.2d at 1054 n.70. In a footnote to his explanation for using the average coefficients, the Administrator noted that the long-term average effluent concentrations for lead and cadmium derived using the average coefficients were higher than the observed average concentration for both lead and cadmium at both the three lead-discharging plants and the three cadmium-plating plants which the Administrator determined had usable data. J. App. at 1361 n.9.[56] Although, as Ford points out, the Administrator had found the cited data insufficient to develop lead and cadmium coefficients directly, we believe that the data nonetheless provides some support for his conclusion reached through use of the group average.

89. We conclude that Ford has failed to overcome the presumption that the Administrator's decision was rational. The Administrator's implicit finding, supported by the available data, that lead and cadmium are equally treatable as the four other metals has not been rebutted by contrary evidence. We therefore reject Ford's challenge to the Administrator's use of the average coefficients to derive the long-term effluent concentrations for lead and cadmium.[57]

B. *The Cost to Segregated Facilities*

90. NAMF charges that the electroplating pretreatment standards are not economically achievable. EPA both disputes the validity of NAMF's contention and argues that NAMF is barred from raising its conten-

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56. EPA cites other evidence, not relied on by the Administrator, to show that all the electroplating standards, including lead and cadmium, are achievable. Brief of Respondent (No. 79-2256) at 150-52. EPA refers to data compiled in the BAT Metal Finishing rulemaking and to a recent survey of NPDES permits. The material cited is outside of the record in the BPT electroplating rulemaking, however. Therefore, it cannot serve as support for the Administrator's decision. *AISI II*, 568 F.2d at 296-97. EPA also cites data in the record from the facilities of Ford and other automakers which showed cadmium and lead effluent concentrations below the electroplating standards. *See* J. App. at 1696, 1760-61. As the Administrator did not consider the data from those facilities to be usable, however, that data can be given little weight.

EPA next notes that the Administrator requested data from the electroplating industry and that the three lead and three cadmium plants proved to be the only sources of usable lead and cadmium data. EPA argues that in those circumstances the court should not second-guess the Administrator where he has acknowledged the limited data base and made efforts to compensate for that lack of data. EPA cites *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979), in which the court stated that it "will not hear industry complain that EPA has used insufficient data when industry was uncooperative in supplying the missing data." *Id.* at 653. Whatever the general validity of such a proposition, *see National Lime Association v. EPA*, 627 F.2d 416, 443 (D.C. Cir. 1980), we will not thus muffle the criticisms of a party who was cooperative in supplying data. *See* J. App. at 1761.

57. Ford also challenges the Administrator's derivation of the variability factors for lead and cadmium by aggregating the data from those metals with that from silver. Ford again fails to show that effluent concentrations for silver, lead and cadmium do not vary to the same extent.

tion. We hold that NAMF is not barred from challenging the electroplating standards. We also hold that the Administrator did not abuse his discretion in concluding that the costs imposed by the standards were justified by the reduction in the discharge of pollution. We will therefore deny the petitions for review.

91. Section 304(b)(1) of the Act states that in promulgating BPT discharge limits the Administrator must identify "the degree of effluent reduction attainable through the application of the best practicable control technology currently available" and must consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." 33 U.S.C. §1314(b)(1)(A), (B) (1976). The legislative history indicates that Congress intended to require "a limited cost-benefit analysis" to determine whether the required technology was indeed practicable. 1972 Legis. Hist. 170 (statement of Sen. Muskie). The Administrator's consideration of cost was to include both the dollar outlays of dischargers to comply with the standards and the potential unemployment and economic dislocation caused by the closing of dischargers unable to comply. *AISI I*, 526 F.2d at 1053 n.57.

92. In promulgating the 1979 electroplating standards the Administrator noted that the standards would have a significant economic impact, particularly on the economically-vulnerable job shops and printed circuit board manufacturers. The Administrator stated that to reduce costs he had imposed less stringent standards on plants with an electroplating process wasteflow of less than 10,000 gallons per day, and had eliminated the limits on hexavalent chromium. 44 Fed. Reg. 52,590-91 (1979); 43 Fed. Reg. 6562 (1978). Nonetheless, he estimated that the cost of compliance for electroplaters would be $1.34 billion in capital costs and $425 million in annual cost. *Id.* at 52,593-94. He also estimated that, rather than attain compliance, 21.5% of indirectly-discharging job shops (587 firms and 9,653 workers) and

3.1% of indirectly-discharging printed circuit board manufacturers (10 firms and 321 workers) might close, and that 3.0% of the employees of indirectly-discharging captive electroplating operations would lose their jobs when those operations shut down (140 firms and 2610 workers). 44 Fed. Reg. 52,594 (1979).[58] At the same time the Administrator estimated that compliance with the standards would remove 140 million pounds per year of toxic pollutants. *Id.* at 52,591. In response to comments that the standards were not achievable,[59] the Administrator stated:

> Congress realized that some businesses would close as a result of the promulgation of technology-based standards. Congress determined that long term environmental benefits were more important than short term dislocations. The Administrator has considered the costs and benefits of this regulation, as evidenced by his exemption of small platers from some requirements.

Id. at 52,602. The Administrator added that he did not conduct a strict cost-benefit analysis because such an

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58. In addition, the Administrator estimated that the average price of electroplating would rise 7%, that production would decline, and that the structure of the industry might change. 44 Fed. Reg. 52,594, 52,617 (1979).

59. In comments on the proposed electroplating standard, the Department of Commerce stated its belief "that regulations which result in the closure of 20% of an entire industrial category are not economically achievable," and recommended that the Administrator base his standards on a less costly technology. J. App. at 777. The Council on Wage and Price Stability said that the estimate of closings for job shops was "overly optimistic" and "raised serious doubts whether the regulation can be viewed as 'practicable.'" J. App. at 989. NAMF commented that the 20% closure rate rendered the standards not economically achievable, and contended that in fact the standards would close 34% to 59% of the job shops. J. App. at 787. To the latter comment the Administrator responded that his estimate was "an approximation, not a 'worst case' estimate." 44 Fed. Reg. 52,594 (1979).

analysis "was discouraged by Congress during the development of the Clean Water Act." *Id.* at 52,606.

1. *The NAMF Settlement Agreement*

93. NAMF and IIPEC sought review of the 1979 electroplating standards in this court. Those parties and the Administrator then entered into the NAMF Settlement Agreement. R. Add. at D-1. Under that agreement the Administrator agreed to propose several specific amendments to the electroplating standards. In addition, the Administrator agreed to include as part of the preamble to those amendments a statement "concerning the relationship between the proposed regulations . . . and possible further best available control technology economically available (BAT) regulations." R. Add. at D-2. The statement affirmed that the BAT standards would be based on technology compatible with that underlying the BPT standards, and that the cumulative impact of the BPT standards would be considered in determining what was economically achievable under the BAT standards. R. Add. at D-8. The statement also said that the Administrator "does not plan to develop more stringent new pretreatment standards" for job shops and printed circuit board manufacturers "in the next several years." *Id.* at D-9. In return, NAMF and IIPEC stated that if the final regulations and preamble did not "differ significantly" from the proposed regulations and preamble, then they would not challenge the 1979 electroplating standards. *Id.* at D-3.

94. We need not consider whether the Administrator had the power to enter into the NAMF Settlement Agreement because we find the Administrator has failed to live up to its terms. The parties to the Settlement Agreement agree that NAMF and IIPEC offered to exchange their right to contest the 1979 standards if the Administrator, *inter alia*, would both publish the suggested language in the preamble and abide by that language. Instead of publishing the language of the Settlement Agreement when he promulgated the 1981 amendments, however, the Administrator wrote a preamble indicating that he could not give the requested assurances. 46 Fed. Reg. 9464 (1981). The Administrator's belated correction does not alter the fact that he failed to comply with the Settlement Agreement. *See* 46 Fed. Reg. 30,625-26 (1981). More important, the Administrator's subsequent actions in the Metal Finishing regulations were not fully in accord with the language of the preamble. By proposing and promulgating an additional requirement on job shops and printed circuit board manufacturers in the form of the limit on total toxic organics ("TTO"), the Administrator has developed a "more stringent pretreatment standard" for those sources. *See* 48 Fed. Reg. 32,462 (1983); 47 Fed. Reg. 38,464 (1982).[60] Imposition of such a new requirement differs significantly from the absence of further requirements contemplated by the Settlement Agreement. We hold, therefore, that NAMF and IIPEC are free to challenge the standards.[61]

60. EPA argues that because the Metal Finishing regulations are not yet effective, it has not yet "developed" the TTO standard. We think that the term "develop" is broad enough to encompass the promulgation of a more stringent pretreatment standard. For that reason, we also reject any suggestion that the TTO requirement, promulgated in 1983, was not developed within "the next several years" of the 1980 NAMF Settlement Agreement.

61. EPA argues that if we permit them to challenge the standards, "NAMF and IIPEC will have obtained a very good bargain indeed." Brief for Respondents (No. 79-2256) at 144-45. We trust that the Administrator made the amendments to the BPT standards and exempted job shops and circuit board manufacturers from the BAT standards in order to fulfill his public duties under the Act.

EPA argues that we cannot consider the challenge of MFASC, which joins in the brief with NAMF and IIPEC, both because it failed to petition for review of the 1979 standards and because it was in privity to NAMF when the latter signed the Settlement Agreement. Because dismissal of MFASC would make no practical difference, we will deny EPA's motion regarding MFASC which was referred to us on March 16, 1983.

2. *The Cost-Benefit Analysis*

95. NAMF contends that the 1979 electroplating standards are not "economically achievable." Brief for Petitioners NAMF *et al.* at 21. It points in particular to the Administrator's estimate that approximately 20% of indirectly discharging job shops, employing almost 10,000 workers, may close as a result of the standards. Because the Act requires that pretreatment standards be "economically achievable," NAMF argues, the electroplating standards are thus arbitrary and capricious. *Id.* at 27.

96. As its language suggests, NAMF asserts that the electroplating standards are not BPT standards. Instead NAMF contends that the standards are based on the best available technology economically achievable — BAT.[62] The consent decree in *NRDC v. Train*, however, required the Administrator to promulgate BPT pretreatment standards for the electroplating industry by May 15, 1977, before promulgating BAT standards for that industry. 8 Env't Rep. Cas. (BNA) at 2128. Although in proposing the electroplating standards the Administrator was imprecise regarding the level of technology on which the standards were based, *see* 43 Fed. Reg. 6560-62, 6564-65, 6568 (1978), it appears that as promulgated the electroplating standards are intended to represent BPT-level technology, *see* 44 Fed. Reg. 52,592, 52,608 (1979).[63]

97. NAMF argues that even if the standards are based on BPT, they must nonetheless be economically

62. NAMF cites the legislative history of the 1977 Amendments, H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 87, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4424, 4462, and the Administrator's statement of his National Pretreatment Strategy, 43 Fed. Reg. 27,762 (1978), both of which state that pretreatment standards will require the application of BAT.

63. NAMF apparently shared that view, for the NAMF Settlement Agreement in its suggested preamble language referred to the 1979 electroplating standards as BPT standards. R. Add. at D-8.

achievable to be "practicable." Reply Brief for Petitioners NAMF, *et al.*, at 4-5. Section 304(b)(1) of the Act does not include economic achievability among the requirements listed for BPT, however. 33 U.S.C. §1314(b)(1) (1976); *see* 1972 Legis. Hist. 231 (statement of Rep. Jones). Instead that section directs the Administrator to consider "the total cost of application of technology in relation to the effluent reduction benefits." 33 U.S.C. §1314(b)(1)(B) (1976); *see also CPC International, Inc. v. Train*, 540 F.2d 1329, 1341 (8th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). We believe that that limited cost-benefit analysis, and BPT itself, have a role in the statutory scheme quite different from the requirement that the best available technology be "economically achievable."

98. BPT does not limit the amount of pollution control required of a discharger or an industry to its economic capability. Rather, this first phase requires the elimination of all pollutant discharges where "the costs imposed on the industry are worth the benefits in pollution reduction." *National Crushed Stone*, 449 U.S. at 76. A discharger not making such "inefficient" discharges need make no further effort toward curtailing pollution, even if he can afford it. *Id.* at 75. A discharger making inefficient discharges must raise his performance to BPT standards; if he cannot afford it he must go out of business. *Id.* at 76. The second phase, BAT, "assumes that the 1977 BPT standard has been met" and that all such inefficient pollutant discharges have been eliminated. *See id.* at 74. The Act then demands "reasonable further progress toward the national goal of eliminating the discharge of all pollutants," 33 U.S.C. §1311(b)(2)(A) (1976), progress that can only be made by requiring the remaining dischargers to eliminate "efficient" discharges, where the costs outweigh the benefits of pollution reduction.[64] It is only at this stage that the Act re-

64. Consequently, "cost is no longer considered *in comparison to* effluent reduction benefits." *National Crushed Stone*, 449 U.S. at

quires that the standards be "economically achievable." *Id.* The remaining dischargers need only commit "the maximum resources economically possible," *National Crushed Stone*, 449 U.S. at 74; if the BAT standard is not within the "economic capability" of a discharger making sufficient progress, he need make only such efforts as are economically achievable for him. 33 U.S.C. §1311(c) (1976); *see National Crushed Stone*, 449 U.S. at 74.

99. In *National Crushed Stone*, the Supreme Court held that, so long as the Administrator had properly found the effluent reduction benefits were worth the costs imposed on an industrial category, it "would be inconsistent with this legislative scheme" to excuse an individual discharger from BPT requirements because those requirements were not economically achievable for him. 449 U.S. at 75, 76-77. We hold that it would be equally inconsistent to require that BPT regulations be economically achievable for even a major proportion of an industrial category. Congress anticipated that the BPT regulations "would cause economic hardship and plant closings" because they would impose on "a substantial number of point sources" within each industrial category additional costs which "must be borne or the point source eliminated." *Id.* at 76, 78-83; *see Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 808-09 (9th Cir. 1980); *AISI I*, 526 F.2d at 1052; *see also* 1977 Legis. Hist. 404 (statement of Rep. Anderson). The closing of 20% of the job shops and the loss of 10,000 jobs, while a severe hardship, will not invalidate the electroplating standards unless the Administrator has failed to consider those costs in relation to the effluent reduction benefits, or has improperly concluded that the benefits are worth the costs.

NOTE — *(Continued)*

71; *accord* 1972 Legis. Hist. 170 (statement of Sen. Muskie). Instead, the Administrator looks only at the cost of achieving the requisite effluent reduction. 33 U.S.C. §1314(b)(2)(B) (1976). *See AISI I*, 526 F.2d at 1051-52.

100. NAMF challenges the Administrator's consideration of the costs and benefits of the electroplating standards. The Administrator is accorded considerable discretion in weighing costs and benefits. *AISI I*, 526 F.2d at 1052 & n.54. As Senator Muskie stated:

> The balancing test between total costs and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction for any class or category of sources.

1972 Legis. Hist. at 170 (statement of Sen. Muskie); *see Association of Pacific Fisheries*, 615 F.2d at 805, 809; *BASF Wyandotte*, 598 F.2d at 656.

101. Contrary to NAMF's assertion, it appears that the Administrator did perform the required cost-benefit analysis for the BPT electroplating standards. He calculated that the benefits would be an effluent reduction of 140 million pounds of toxic pollutants per year, and that the total costs would be $1.34 billion plus $425 million annually, resulting in the closing of 737 electroplating operations and the loss of 12,584 jobs. He then stated that he had considered the costs and benefits in promulgating the electroplating regulations. From this we can reasonably discern that the Administrator concluded that the benefits were worth the costs.

102. NAMF argues that the Administrator's cost-benefit analysis was fatally flawed, however, because he failed to consider less burdensome alternatives. It claims that if the electroplating standards were five percent less stringent the costs to electroplaters could be cut in half. EPA denies that the Administrator must make any such marginal analysis for BPT.

103. Section 304(b)(1) directs the Administrator to consider "the total cost" in relation to the effluent reduction benefits resulting from the application of control

technology. 33 U.S.C. §1314(b)(1)(A) (1976).[65] The legislative history of this requirement leads us to conclude that Congress intended that the Administrator consider "the *additional* degree of effluent reduction" in relation to "the costs of achieving such *marginal* level of reduction." 1972 Legis. Hist. 170 (statement of Sen. Muskie) (emphasis added); *see AISI I*, 526 F.2d at 1076 n.19 (Adams, J., concurring). Indeed, given the place of BPT standards in the two-phase statutory scheme, a balancing solely of net costs and net effluent reduction benefits would make no sense under the Act. By setting as a national goal the elimination of pollutant discharges, Congress at least preliminarily has weighed the costs and benefits of achieving such a goal and has determined that society would thus be better off — that the net benefits exceed the net costs. *See Weyerhaeuser*, 590 F.2d at 1037. If the BPT cost-benefit analysis were to be conducted on a net basis, the national goal could be attained by BPT standards alone. Congress envisioned BPT standards as only a first stage, however. It provided for the second-stage BAT standards to make further progress towards the national goal, and at the same time indicated that the BPT cost-benefit analysis served "to limit the application of technology" required of dischargers under BPT standards. 1972 Legis. Hist. 170 (statement of Sen. Muskie). To perform its limiting function, and to preserve any role for BAT standards in the statutory scheme, BPT cost-benefit analysis must be conducted on a marginal basis.

65. In using the words "total" cost Congress desired only to ensure that the Administrator would consider both the "internal" dollar costs if a plant made the expenditures to meet the standards, and "external" costs, such as economic dislocation, if a plant went out of business instead. 1972 Legis. Hist. at 231, 237-38 (statement of Rep. Jones); *id.* at 259 (statement of Rep. Wright); *see* H.R. No. 11896, 92d Cong., 2d Sess. §304(b)(1)(B) (1972); *see also Weyerhaeuser*, 590 F.2d at 1036 n.35.

104. In *Weyerhaeuser Corp. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978), the petitioners argued that the Administrator had to make an incremental balancing of costs and benefits in promulgating certain BPT effluent limitations. *Id.* at 1047. The court replied:

> A requirement that EPA perform the elaborate task of calculating incremental balances would bog the Agency down in burdensome proceedings on a relatively subsidiary task. Hence, the Agency need not on its own undertake more than a net cost-benefit balancing to fulfill its obligation under section 304.
>
> However, when an incremental analysis has been performed by industry and submitted to EPA, it is worthy of scrutiny by the Agency, for it may "avoid the risk of hidden imbalances between cost and benefit."

Id. at 1048 (quoting *AISI I*, 526 F.2d at 1076 n.19 (Adams, J., concurring)); *accord BASF Wyandotte*, 598 F.2d at 656 & n.37. The *Weyerhaeuser* court examined the marginal analysis submitted by the petitioners and found no hidden imbalance between the marginal costs and benefits. *Id.*

105. While we agree that for BPT "the cost of compliance was not a factor to be given *primary* importance," *AISI I*, 526 F.2d at 1051 (emphasis added), both cost and benefit remain factors that the Administrator must consider and compare. *See Weyerhaeuser*, 590 F.2d at 1045-46. Such comparison is meaningless unless conducted on a marginal basis. Marginal analysis may indeed be an elaborate task, *see AISI I*, 526 F.2d at 1076 n.19 (Adams, J., concurring), but Congress anticipated that the Administrator would have to engage in "complex balancing." 1972 Legis. Hist. 181 (statement of Sen. Muskie); *see* H.R. Rep. No. 911, 92d Cong., 2d Sess. 107, *reprinted in* 1972 Legis. Hist. 753, 794. Moreover, while we agree that only marginal analysis

will reveal hidden imbalances between cost and benefit, we cannot understand why the Act would require such analysis only on request. We therefore conclude that the Administrator on his own must undertake a sufficient marginal analysis to indicate that the marginal cost is not wholly out of proportion to the marginal effluent reduction benefit. *See also American Paper Institute v. EPA*, 660 F.2d 954, 961 (4th Cir. 1981).

106. We note that despite his legal position in this case the Administrator apparently employed marginal cost-benefit analysis in setting the electroplating standards. *See AISI II*, 568 F.2d at 297. He stated:

> Although the Clean Water Act does not require consideration of alternative timing, or alternative methods of ensuring compliance, EPA has considered alternative stringency levels, and alternative types of regulations.

44 Fed. Reg. 52,593 (1978); *see* J. App. at 1693. The Administrator lifted many requirements from electroplaters with smaller flows, finding that his action would "greatly [reduce] the projected economic impact of the standards while relaxing controls on less than one percent of the flow." 43 Fed. Reg. 6561 (1978). He set the required flow rate at 10,000 gallons per day by balancing the marginal economic impact against the effluent reduction benefits. 44 Fed. Reg. 52,603-04 (1979). Similarly, the Administrator eliminated the hexavalent chromium limits because it reduced the cost of the electroplating standards without significant environmental effect. *Id.* at 52,591.

107. NAMF claims, however, that it demonstrated a hidden imbalance between marginal costs and benefits by submitting a less burdensome alternative in its comments on the 1978 proposed pretreatment standards. In those comments NAMF suggested that the standards be made less stringent so that electroplaters could release their rinse waters without pretreatment. J. App. at 853.

As rinse waters comprise 90% of the volume of the electroplating process wastestream, 43 Fed. Reg. 6565 (1978), NAMF argued that the remaining wastewaters, containing higher concentrations of pollutants, could be pretreated in smaller pretreatment facilities at less than half the cost. J. App. at 854-56. Unlike NAMF's brief in this case, however, its comments failed to calculate the effluent reduction benefit lost by permitting rinse water to go without treatment.[66] Without knowing the incremental benefit, it is impossible to determine whether the economic costs imposed are indeed wholly out of proportion. We therefore reject NAMF's assertion that it has demonstrated an inbalance between the incremental cost and benefit.

108. NAMF makes several challenges to the validity of the Administrator's determination of the cost and economic impact of the electroplating standards. We have examined each contention and have found that the Administrator's challenged decisions were not arbitrary and capricious.[67]

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66. NAMF's comments state merely that the halfing of costs could be obtained by following limits similar to those applied by the City of Chicago. J. App. at 854. NAMF says such limits remove 75% of the pollutants, but fails to specify the level of removal gained by the Administrator's standards. *Id.* at 853. NAMF does cite the specific discharge limits imposed by Chicago, but comparison of those limits with the discharge limits proposed by the Administrator reveals no easily ascertainable effluent reduction difference. *Compare* J. App. at 854 *with* 43 Fed. Reg. 6570-73 (1978). With such uninformative data it is impossible for us to even estimate the effluent reduction benefit foregone. While NAMF's brief suggests that the effluent reduction benefit foregone would be from 4-8% of the discharged pollutants, Reply Brief for Petitioners NAMF, *et al.*, at 11, we can no more overturn the Administrator's decision based on petitioners' counsels' post-hoc factual assertions than we could uphold that decision based on respondent's counsel's post hoc rationalization, *see* Brief for Respondent (No. 79-2256) at 181 n.**, *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *AISI II*, 568 F.2d at 296-97.

67. First, NAMF attacks the Administrator's assumption that the owner of an electroplating firm would reduce his compensation

109. We are thus left with NAMF's assertion that the net costs of the 1979 electroplating standards are wholly out of proportion to the net effluent reduction benefits. We cannot say that the Administrator was arbitrary and capricious when he determined that the removal of 140 million pounds per year of toxic pollutants

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NOTE — *(Continued)*
to $15,000, for one year only, if necessary to keep his firm from closing. The Administrator admitted that in assuming such self-sacrifice he was overriding his own sampling data, but he explained that only when actually faced with closure could the owners' behavior be predicted. J. App. at 1649. The Administrator also stated that the $15,000 figure was above the median family income and was thus a reasonable minimum compensation. 44 Red. Reg. 52,614 (1979).

Second, NAMF assails the Administrator's assumption that job shops would be able through higher prices to pass on to their customers the costs of complying with the pretreatment standards. The Administrator explained that electroplaters operated "[i]n a highly differentiated market, where each producer enjoys partial or complete monopoly power," and that their services formed such an inexpensive and yet valued part of most electroplated products as to generate a fairly inelastic demand. *Id.* at 52,615-16.

Third, NAMF criticizes the Administrator's use of 1976-level costs and dollars in his cost analysis. The Administrator answered that he had verified that 1976 was a representative year for electroplaters. J. App. at 1576.

Fourth, NAMF asserts that the Administrator failed to analyze the secondary impact of the predicted electroplating price hikes and production cuts on the economy as a whole. The Administrator conceded that because he lacked the extensive data required he had not made a quantative analysis. However, he stated that in a qualitative analysis he had found that the small percentage of total product cost represented by electroplating, together with the excess capacity in the industry, would minimize the resulting production bottlenecks and price increases to electroplating customers. 44 Red. Reg. 52,616-17 (1979).

Finally, NAMF charges that the Administrator's economic closure model needed to be verified empirically before being used to support regulations. The Administrator stated that such verification was not possible with the data available to the Agency, and would be inconclusive. *Id.* at 52,613.

was worth $1.34 billion plus $425 million annually, with the loss of 737 firms and 12,584 jobs.

C. *The Compliance Deadline for Integrated Facilities*

110. Section 413.01(a) of the electroplating standards directs that integrated electroplaters must comply with the standards by three years after the effective date of the combined wastestream formula. 40 C.F.R. §403.6(e) (1982). 40 C.F.R. §413.01(a), (c) (2). GM claims that the Administrator's unsuccessful effort to indefinitely postpone the effective date of the formula has left integrated electroplaters only 21 months in which to achieve compliance. GM contends that that reduced time for compliance renders the three-year deadline arbitrary and capricious. We disagree, and will deny GM's petition for review on this issue.

111. Section 307(b) of the Act directs the Administrator to promulgate categorical pretreatment standards for existing sources, and requires that such standards "shall specify a time for compliance not to exceed three years from the date of promulgation." 33 U.S.C. §1317(b)(1) (1976 & Supp. I 1977). When the Administrator promulgated the electroplating standards in 1979, he set the compliance date for all facilities at the maximum three years, October 12, 1982, "because of the high projected economic impact of these pretreatment standards." 44 Fed. Reg. 52,595 (1979); *see* 43 Fed. Reg. 6562 (1978). He subsequently exempted integrated facilities from the electroplating standards until the proposed combined wastestream formula became effective. 45 Fed. Reg. 19,246 (1980). When the Administrator promulgated the formula, denied Ford's petition for review, and promulgated the electroplating amendments on January 28, 1981, he announced that integrated electroplaters would not have to comply with the 1979 electroplating standards or the 1981 electroplating amendments until three years from the formula's effec-

tive date of March 13, 1981. 46 Fed. Reg. 9464 (1981); *see id.* at 9404. The Administrator justified the extension by stating that the formula "would have to be promulgated in final form before integrated facilities would understand their compliance obligations under the electroplating standards." *Id.* at 9464.

112. After an initial postponement of the formula's effective date to March 30, 1981, the Administrator then indefinitely postponed the formula's effective date. *See* 47 Fed. Reg. 4518 (1982); 46 Fed. Reg. 50,502-03 (1981); *see also id.* at 11,971 (1981). He explained that because he had received numerous comments criticizing the "highly controversial" formula's effect on integrated facilities, he believed the formula should be deferred "while the Agency studies the implications of the present formula further." 47 Fed. Reg. 4519, 4520 (1982). The Administrator recognized that the indefinite postponement of the formula also postponed the date by which integrated facilities had to comply with the electroplating standards. 46 Fed. Reg. 43,973 (1981).

113. In *NRDC v. EPA*, 683 F.2d 752 (3d Cir. 1982), we found that the Administrator's attempt at indefinite postponement violated the notice and comment requirements of the Administrative Procedure Act. Although we noted that the attempted postponement of the formula had effectively postponed the compliance date for integrated electroplaters, *id.* at 756-57, we ordered the Administrator to reinstate the combined wastestream formula, effective March 30, 1981. *Id.* at 768-69. We stated:

> Our decision does not, of course, forestall future agency action with regard to the [combined wastestream formula], provided such action is taken in compliance with the Administrative Procedure Act.

Id. at 768-69. Soon after our decision, on August 10, 1982, GM filed a petition for reconsideration asking the

Administrator to suspend the effective date of the formula. The parties informed us at oral argument that GM's petition had been denied. Transcript of Oral Argument at 235, 241.

114. We recognize the dilemma for integrated electroplaters caused by the Administrator's attempted indefinite postponement. We took that dilemma into account in deciding *NRDC v. EPA*, however. We were cognizant of the effect our decision would have upon the compliance date for integrated electroplaters, and we nonetheless reinstated the combined wastestream formula. We left to the Administrator any postponement of the effective date of the formula. GM's petition initiated that administrative process. GM's recourse is to petition for review of the Administrator's denial of that petition, not to raise the issues in this proceeding. We will therefore deny GM's petition for review on this issue. We hold that GM has failed to show that the Administrator has abused his discretion.

V. CONCLUSION

115. We will grant the petitions for review in Nos. 81-1279, 81-1977, 81-1982, 81-1983, 81-1984, 81-1985, 81-2150, and 81-2151. We will deny all other petitions. We will also deny EPA's motion regarding MFASC.

116. We will remand to the Administrator:

(a) 40 C.F.R. §403.3(i) (1982), establishing the definition of "interference;"

(b) 40 C.F.R. §403.3(k) (1982), establishing the definition of "new source;"

(c) 40 C.F.R. §403.3(n) (1982), establishing the definition of "pass through;" and

(d) 40 C.F.R. §403.13 (1982), containing the fundamentally different factor variance provision.

GIBBONS, *Circuit Judge*.

I join in the opinion of the court. I write separately only to note that if the interference rule, 40 C.F.R. §403.3(i) (1982), is clarified to reflect the interpretation which the government urged at the oral argument on this appeal, it will be consistent with 33 U.S.C. §1317(b) and (c). The interference must be caused by a pollutant. If it is established that the interference is caused by a pollutant, and a user of the POTW is a source of such pollutant, the three methods set forth in 40 C.F.R. §403.3(i) (1982) for determining responsibility for the interference satisfy both the Clean Water Act and due process.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U. S. Courts. The Legal Intelligencer, Phila., Pa.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2256

NATIONAL ASSOCIATION OF METAL FINISHERS, ELECTROPLATERS OF YORK, INC. AND PIONEER METAL FINISHING, INC.,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

No. 79-2443

THE INSTITUTE FOR INTERCONNECTING AND PACKAGING ELECTRONIC CIRCUITS,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Nos. 80-1008, 81-1210, 81-1279

FORD MOTOR COMPANY, INC.,
Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE, Administrator, United States Environmental Protection Agency,
Respondents

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Intervenor

No. 81-1351

NATIONAL ASSOCIATION OF METAL FINISHERS
and INSTITUTE FOR INTERCONNECTING
AND PACKAGING ELECTRONIC CIRCUITS,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

No. 81-1712

GENERAL MOTORS CORPORATION,

Petitioner

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and WALTER
BARBER, Acting Administrator, United States
Environmental Protection Agency,

Respondents

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Intervenor

No. 81-1977

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioner

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
401 M Street, S.W., Washington, D.C. 20460 and
DOUGLAS M. COSTLE, ADMINISTRATOR,
U.S. Environmental Protection Agency,
401 M Street, S.W., Washington, D.C. 20460,

Respondents

CHEMICAL MANUFACTURERS ASSOCIATION
AMERICAN CYANAMID COMPANY
FMC CORPORATION
UNION CARBIDE CORPORATION,

Intervenors

No. 81-1978

UNITED STATES BREWERS ASSOCIATION,

Petitioner

v.

ADMINISTRATOR, ENVIRONMENTAL
PROTECTION AGENCY, and
ENVIRONMENTAL PROTECTION AGENCY,

Respondents

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Intervenor

No. 81-1979

MANUFACTURING CHEMISTS ASSOCIATION,
AMERICAN PAPER INSTITUTE, NATIONAL
FOREST PRODUCTS ASSOCIATION, NATIONAL
PAINT AND COATINGS ASSOCIATION,
SYNTHETIC ORGANIC CHEMICAL
MANUFACTURERS ASSOCIATION, AIR

PRODUCTS AND CHEMICALS, INC.,
AMERICAN CYANAMID COMPANY, FMC
CORPORATION, HERCULES INCORPORATED,
SHELL OIL COMPANY, and UNION
CARBIDE CORPORATION,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Intervenor

No. 81-1981

ASSOCIATION OF METROPOLITAN
SEWERAGE AGENCIES,

Petitioner

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Intervenor

No. 81-1982

NATIONAL ASSOCIATION OF METAL FINISHERS,

Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Intervenor

No. 81-1983

CHEMICAL MANUFACTURERS ASSOCIATION,
AMERICAN CYANAMID COMPANY, FMC
CORPORATION, UNION CARBIDE CORPORATION,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Intervenor

No. 81-1984

AMERICAN PAPER INSTITUTE and NATIONAL
FOREST PRODUCTS ASSOCIATION,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Intervenor

No. 81-1985

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,
1725 Eye Street, N.W., Washington, D.C. 20006,

Petitioner

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
401 M Street, S.W., Washington, D.C. 20460.
Respondent

CHEMICAL MANUFACTURERS ASSOCIATION
AMERICAN CYANAMID COMPANY
FMC CORPORATION
UNION CARBIDE CORPORATION,
Intervenors

No. 81-2119

METAL FINISHING ASSOCIATION
OF SOUTHERN CALIFORNIA,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

No. 81-2150

INTERLAKE, INC., REPUBLIC STEEL
CORPORATION and UNITED STATES
STEEL CORPORATION,
Petitioners

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,
Intervenor

AMERICAN IRON & STEEL INSTITUTE
ROUGE STEEL CO.,
Intervenors

No. 81-2151

CHICAGO ASSOCIATION OF COMMERCE AND
INDUSTRY, ILLINOIS MANUFACTURERS'
ASSOCIATION, and MID-AMERICAN LEGAL
FOUNDATION,
Petitioners

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,
Intervenor

ON PETITIONS FOR REVIEW OF ACTIONS
OF THE ENVIRONMENTAL PROTECTION AGENCY

Argued June 20, 1983

Before: GIBBONS, HUNTER and BECKER, *Circuit Judges*

Opinion filed September 20, 1983

ORDER AMENDING OPINION

1. The slip opinion filed in this case on September 20, 1983 is hereby amended as follows:

a. The last two sentences of paragraph 1 shall be amended to read as follows:

Under that standard of review, we find invalid certain provisions of the general pretreatment regulations. Because it is not for us to rewrite those provisons, we will remand them to the Administrator.

b. The reference to the petition for review in No. 81-1279 shall be deleted from paragraph 115.

By THE COURT,

/s/ James Hunter, III

Circuit Judge

Dated: October 5, 1983

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

A.O. U.S. Courts G.M.C. Printing, Phila., Pa. 215-568-4264

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-2256

NATIONAL ASSOCIATION OF METAL FINISHERS, ELECTROPLATERS OF YORK, INC. AND PIONEER METAL FINISHING, INC., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

No. 79-2443

THE INSTITUTE FOR INTERCONNECTING AND PACKAGING ELECTRONIC CIRCUITS, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

Nos. 80-1008, 81-1210, 81-1279

FORD MOTOR COMPANY, INC., *Petitioner*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE, Administrator, United States Environmental Protection Agency, *Respondents*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1351

NATIONAL ASSOCIATION OF METAL FINISHERS and INSTITUTE FOR INTERCONNECTING AND PACKAGING ELECTRONIC CIRCUITS, *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

No. 81-1712

GENERAL MOTORS CORPORATION, *Petitioner*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and WALTER BARBER, Acting Administrator, United States Environmental Protection Agency, *Respondents*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1977

NATURAL RESOURCES DEFENSE COUNCIL, INC.
917 15th Street, N.W., Washington, D.C. 20005, *Petitioner*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
401 M Street, S.W., Washington, D.C. 20460 and
DOUGLAS M. COSTLE, ADMINISTRATOR,
U.S. Environmental Protection Agency, 401 M Street, S.W.,
Washington, D. C. 20460, *Respondents*

CHEMICAL MANUFACTURERS ASSOCIATION
AMERICAN CYANAMID COMPANY
FMC CORPORATION
UNION CARBIDE CORPORATION, *Intervenors*

No. 81-1978

UNITED STATES BREWERS ASSOCIATION, *Petitioner*

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, and ENVIRONMENTAL PROTECTION AGENCY, *Respondents*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1979

MANUFACTURING CHEMISTS ASSOCIATION,
AMERICAN PAPER INSTITUTE,
NATIONAL FOREST PRODUCTS ASSOCIATION,
NATIONAL PAINT AND COATINGS ASSOCIATION,
SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION,
AIR PRODUCTS AND CHEMICALS, INC.,
AMERICAN CYANAMID COMPANY, FMC CORPORATION,
HERCULES INCORPORATED, SHELL OIL COMPANY,
and UNION CARBIDE CORPORATION, *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondents*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1981

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, *Petitioner*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1982

NATIONAL ASSOCIATION OF METAL FINISHERS, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1983

CHEMICAL MANUFACTURERS ASSOCIATION,
AMERICAN CYANAMID COMPANY, FMC CORPORATION,
UNION CARBIDE CORPORATION, *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1984

AMERICAN PAPER INSTITUTE and
NATIONAL FOREST PRODUCTS ASSOCIATION, *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1985

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
1725 Eye Street, N.W., Washington, D.C. 20006, *Petitioner*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
401 M Street, S.W., Washington, D.C. 20460, *Respondent*

CHEMICAL MANUFACTURERS ASSOCIATION
AMERICAN CYANAMID COMPANY
FMC CORPORATION
UNION CARBIDE CORPORATION, *Intervenors*

No. 81-2119

METAL FINISHING ASSOCIATION OF SOUTHERN CALIFORNIA, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

No. 81-2150

INTERLAKE, INC., REPUBLIC STEEL CORPORATION and
UNITED STATES STEEL CORPORATION, *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*
AMERICAN IRON & STEEL INSTITUTE
ROUGE STEEL CO., *Intervenors*

No. 81-2151

CHICAGO ASSOCIATION OF COMMERCE AND
INDUSTRY, ILLINOIS MANUFACTURERS' ASSOCIATION, and
MID-AMERICAN LEGAL FOUNDATION, *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

ON PETITION FOR REVIEW OF ACTIONS OF THE ENVIRONMENTAL PROTECTION AGENCY

Present: GIBBONS, HUNTER and BECKER, *Circuit Judges*

AMENDED JUDGMENT

These causes came on to be heard on the record from the Environmental Protection Agency, and were argued by counsel June 20, 1983.

On consideration whereof, it is now ordered and adjudged by this Court that:

1. The petitions for review of the regulations of the said Agency published at 46 Fed. Reg. 9404 (January 28, 1981), docketed at C.A. Nos. 81-1977, 81-1983, 81-1984, 81-2150 and 81-2151, be and the same are hereby granted; and,
2. The said causes, at 1 supra, are hereby remanded to the said Agency for further proceedings consistent with the opinion of this Court.

It is further ordered and adjudged that the petitions for review docketed at C. A. Nos. 79-2256, 79-2443, 80-1008, 81-1210, 81-1279, 81-1351, 81-1712, 81-1978, 81-1979, 81-1981, 81-1982, 81-1985 and 81-2119, be, and the same are hereby denied and the respective actions of the said Agency are hereby affirmed in accordance with the opinion of the Court.

It is further ordered and adjudged that the following provisions of the Code of Federal Regulations be, and the same are hereby remanded to the Administrator for further proceedings in accordance with the opinion of this Court:

(a) 40 C.F.R. § 403.3(i) (1982), establishing the definition of "interference,"

(b) 40 C.F.R. § 403.3(k) (1982), establishing the definition of "new source;"

(c) 40 C.F.R. § 403.3(n) (1982), establishing the definition of "pass through;" and

(d) 40 C.F.R. § 403.13 (1982), containing the fundamentally different factor variance provision.

It is further ordered and adjudged that that portion of the Environmental Protection Agency's motion filed February 11, 1983, regarding whether the Metal Finishing Association of

Southern California is bound by the 1980 Environmental Protection Agency—National Association of Metal Finishers settlement, is hereby denied.

Costs taxed against respondents in C. A. 81-1977, 81-1983, 81-1984, 81-2150, and 81-2151. Costs taxed against petitioners in C. A. Nos. 79-2256, 79-2443, 80-1008, 81-1210, 81-1279, 81-1351, 81-1712, 81-1978, 81-1979, 81-1981, 81-1982, 81-1985, and 81-2119. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

October 5, 1983

Certified as a true copy and issued in lieu
of a formal mandate on November 1, 1983.

ATTEST:

/s/ Sally Mrvos
SALLY MRVOS
Clerk, U.S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2256

NATIONAL ASSOCIATION OF METAL FINISHERS, ELECTROPLATERS OF YORK, INC. AND PIONEER METAL FINISHING, INC., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

No. 79-2443

THE INSTITUTE FOR INTERCONNECTING AND PACKAGING ELECTRONIC CIRCUITS, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

Nos. 80-1008, 81-1210, 81-1279

FORD MOTOR COMPANY, INC., *Petitioner*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE, Administrator, United States Environmental Protection Agency, *Respondents*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1351

NATIONAL ASSOCIATION OF METAL FINISHERS and INSTITUTE FOR INTERCONNECTING AND PACKAGING ELECTRONIC CIRCUITS, *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

No. 81-1712

GENERAL MOTORS CORPORATION, *Petitioner*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and WALTER BARBER, Acting Administrator, United States Environmental Protection Agency, *Respondents*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1977

NATURAL RESOURCES DEFENSE COUNCIL, INC.
917 15th Street, N.W., Washington, D.C. 20005, *Petitioner*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
401 M Street, S.W., Washington, D.C. 20460 and
DOUGLAS M. COSTLE, ADMINISTRATOR,
U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, *Respondents*

CHEMICAL MANUFACTURERS ASSOCIATION
AMERICAN CYANAMID COMPANY
FMC CORPORATION
UNION CARBIDE CORPORATION, *Intervenors*

No. 81-1978

UNITED STATES BREWERS ASSOCIATION, *Petitioner*

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, and ENVIRONMENTAL PROTECTION AGENCY, *Respondents*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1979

MANUFACTURING CHEMISTS ASSOCIATION,
AMERICAN PAPER INSTITUTE,
NATIONAL FOREST PRODUCTS ASSOCIATION,
NATIONAL PAINT AND COATINGS ASSOCIATION,
SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION,
AIR PRODUCTS AND CHEMICALS, INC.,
AMERICAN CYANAMID COMPANY, FMC CORPORATION,
HERCULES INCORPORATED, SHELL OIL COMPANY,
and UNION CARBIDE CORPORATION, *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondents*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1981

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, *Petitioner*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1982

NATIONAL ASSOCIATION OF METAL FINISHERS, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1983

CHEMICAL MANUFACTURERS ASSOCIATION,
AMERICAN CYANAMID COMPANY, FMC CORPORATION,
UNION CARBIDE CORPORATION, *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1984

AMERICAN PAPER INSTITUTE and
NATIONAL FOREST PRODUCTS ASSOCIATION, *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

No. 81-1985

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
1725 Eye Street, N.W., Washington, D.C. 20006, *Petitioner*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
401 M Street, S.W., Washington, D.C. 20460, *Respondent*

CHEMICAL MANUFACTURERS ASSOCIATION
AMERICAN CYANAMID COMPANY
FMC CORPORATION
UNION CARBIDE CORPORATION, *Intervenors*

No. 81-2119

METAL FINISHING ASSOCIATION OF SOUTHERN CALIFORNIA, *Petitioner*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

No. 81-2150

INTERLAKE, INC., REPUBLIC STEEL CORPORATION and UNITED STATES STEEL CORPORATION, *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*
AMERICAN IRON & STEEL INSTITUTE
ROUGE STEEL CO., *Intervenors*

No. 81-2151

CHICAGO ASSOCIATION OF COMMERCE and INDUSTRY, ILLINOIS MANUFACTURERS' ASSOCIATION, and MID-AMERICAN LEGAL FOUNDATION, *Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*
NATURAL RESOURCES DEFENSE COUNCIL, INC., *Intervenor*

ON PETITIONS FOR REVIEW OF ACTIONS OF THE ENVIRONMENTAL PROTECTION AGENCY

Present: GIBBONS, HUNTER and BECKER, *Circuit Judges*

SECOND AMENDED JUDGMENT

These causes came on to be heard on the record from the Environmental Protection Agency, and were argued by counsel June 20, 1983.

On consideration whereof, it is now ordered and adjudged by this Court that:

1. The petitions for review of the regulations of the said Agency published at 46 Fed. Reg. 9404 (January 28, 1981), docketed at C.A. Nos. 81-1977, 81-1983, 81-1984, 81-1985, 81-2150 and 81-2151, be and the same are hereby granted; and,
2. The said causes, at 1 supra, are hereby remanded to the said Agency for further proceedings consistent with the opinion of this Court.

It is further ordered and adjudged that the petitions for review docketed at C. A. Nos. 79-2256, 79-2443, 80-1008, 81-1210, 81-1279, 81-1351, 81-1712, 81-1978, 81-1979, 81-1981, 81-1982 and 81-2119, be, and the same are hereby denied and the respective actions of the said Agency are hereby affirmed in accordance with the opinion of the Court.

It is further ordered and adjudged that the following provisions of the Code of Federal Regulations be, and the same are hereby remanded to the Administrator for further proceedings in accordance with the opinion of this Court:

(a) 40 C.F.R. § 403.3(i) (1982), establishing the definition of "interference,"

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(c) 40 C.F.R. § 403.3(n) (1982), establishing the definition of "pass through;" and

(d) 40 C.F.R. § 403.13 (1982), containing the fundamentally different factor variance provision.

It is further ordered and adjudged that the portion of the Environmental Protection Agency's motion filed February 11, 1983, regarding whether the Metal Finishing Association of

Southern California is bound by the 1980 Environmental Protection Agency—National Association of Metal Finishers settlement, is hereby denied.

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ATTEST:

/s/ M. Elizabeth Ferguson
M. ELIZABETH FERGUSON
Chief Deputy Clerk

DECEMBER 7, 1983

List of Corporate Petitioners' Parents, Subsidiaries, And Affiliates Pursuant to Supreme Court Rule 28.1

This list is submitted pursuant to Rule 28.1 of the Supreme Court Rules.

AMERICAN CYANAMID COMPANY

Subsidiaries and Affiliates

Arizona Chemical Company
B. Braun-Dexon G.m.b.H.
B. Braun-Dexon, S.A.
Brewster Phosphates
Cyanamid Chimica Italiana S.r.l.
Cyanamid Fothergill Limited
Cyanamid Holdings Limited
Cyanamid Iberica, S.A.
Cyanamid India Limited
Cyanamid Italia S.p.A.
Cyanamid-Ketjen Katalysator B.V.
Cyanamid (Pakistan) Limited
Cyanamid Portugal, Limitada
Cyanamid Taiwan Corporation
Cyanamire S.r.l.
Cyanenka S.A.
CYRO Industries
Societe Anonyme Formica
Formica Espanola S.A.
Formica GmbH and Co. KG
Formica Plastics Pty. Limited
Laboratoires Lederle S.A.
Lederle (Japan) Ltd.
Lederle (Nigeria) Ltd.
Laminate Industries (Pty.) Limited
Mitsui-Cyanamid Ltd.
Molecular Genetics, Inc.
Sherkat Sahami Cyanamid-KBC

Societe des Sutures Chirurgicales Robert & Carriere-Lederle
Sutumex, S.A. de C.V.
TDF Tiofine B.V.
The Catalyst Company
YuHan-Cyanamid, Inc.

FMC CORPORATION

Subsidiaries and Affiliates

Asia Pacific Agricultural Development Corporation
Asociacion Experimental Agricola (AEA)
Ataka Construction & Engineering Co., Ltd.
Avicon, Inc.
Basse Sambre, E.R.I., S.A. Etudes et Recherches Industrielles
British Cardboard Box Machine Co., Ltd.
CBV—Industria Mechanica, S.A.
Chlor-Chem Limited
Coproqui—Comercial e Industrial de Productos Quimicos S.A.
Electro Quimica Mexicana, S.A. de C.V.
Eucheuma Development Philippines, Inc.
Fabricacion Maquinaria y Cerras, S.A. de C.V.
Fazenda Candiru S.A.
Filsan Argentina, S.A.
Filsan-Servicos E Empreendimentos S/C. Ltda.
FMC Ag-Chem Thai Limited
FMC Agroquimica de Mexico, S. de R.L. de C.V.
FMC, Argentina, Sociedad Anonyma Comercial, Industrial, y Financiera
FMC do Basil S.A. Industria e Comercio
FMC Developments N.V.
FMC Europe, N.V.
FMC Europe, S.A.
FMC Food Machinery Europe S.A.
FMC Food Machinery France S.A.
FMC Food Machinery Italy S.p.A.

FMC—Foret, Compania Colectiva
FMC Guatemala, S.A.
FMC (Ireland) Limited
FMC Machinery (Germany) GmbH
FMC de Mexico, S.A. de C.V.
FMC Saudi Arabia Limited
FMC—Servicos e Empreendimentos S/C. Ltda.
FMC Spain S.A.
FMC Wellhead de Venezuela, S.A.
Foret, S.A.
Foret Arif Libanaise, S.A.R.L.
Huron Forge and Machine Company
IMRX Corporation
Jamex, S.A.

UNION CARBIDE CORPORATION

Subsidiaries and Affiliates

ACM Services
Administracion Y Servicios Carmex S. A. De C. V.
P. T. Agrocarb Indonesia
Agromore, Ltd.
Argon, S. A.
Arizona Welding Equipment Co.
Beralt Tin and Wolfram Ltd.
Calida Gas B. V.
Carbide Hashim Industrial Gas Co. Ltd.
Chemos Industries Pty. Ltd.
Chrome Corporation (South Africa) (Pty.) Ltd.
Cia National de Calcareos e Derivados
Dai Nippon Jushi Co. Ltd.
Delvan Pty. Ltd.
Elektrode Maatskapy Van Suid Africa (Eiendoms) Beperk
Eletro Manganes Ltda.
Eletrometalurgica Suadade Ltda.
Empresa Brasileira De Reflorestamento e Argo-Pecuaria Ltda.

Empress Brasileira De Cilendros Ltda.
Incarmex, S. A. De C. V.
Indugas N. V.
Joint Industries (Hycel) 1970 Ltd.
Karaj Road Property Co. Ltd.
P. T. Karmi Arafura Fisheries
La Littorale S. A.
Miami Welding Supply, Inc.
Montrose Exploration Co. S. A. (Pty.) Ltd.
Nepal Battery Co. Ltd.
Nippon Unicar Co.
Nitropet, S. A.
Oxigenio Edy S. A.
Oxigeno Del Norte, S. A.
Oy Unifos A.B.
Servicos Administrativos Carmex S. A. De C. V.
Servicos DYC S. A. De C. V.
Societe Civile Des Produits Lifine
Sony-Eveready Inc.
Tubatse Ferrochrome (Pty.) Ltd.
Ucar Plastics Ghana Ltd.
Unifos Kemi A. B.
Union Carbide Argentina S. A. I. C. S.
Union Carbide Australia & New Zealand Ltd.
Union Carbide Australia Ltd.
Union Carbide Canada Ltd.
Union Carbide Ceylon Ltd.
Union Carbide Egypt S. A. E.
Union Carbide France, S. A.
Union Carbide Ghana Ltd.
Union Carbide India Ltd.
Union Carbide Kenya Ltd.
Union Carbide Malaysia Sdn. Bhd.
Union Carbide Mexicana, S. A.
Union Carbide New Zealand Ltd.
Union Carbide Nigeria Ltd.
Union Carbide Pakistan Ltd.
Union Carbide Sudan Ltd.

Union Carbide Yemen Ltd.
Union Gas Co. Ltd.
Union Polymers Sdn. Bhd.
Union Showa K. K.
United States Welding, Inc.
Sociedad Anomima White Martins
S. A. White Martins Nordeste

CLEAN WATER ACT PROVISIONS

1. Section 301(b) of the Clean Water Act, as amended, 33 U.S.C. § 1311(b) (1976 & Supp. V 1981):

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314 (b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator

pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of dischargers of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub. L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

2. Section 301(l) of the Clean Water Act, as amended, 33 U.S.C. § 1314(l) (Supp. V 1981):

(l) Toxic pollutants

The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this list.

3. Section 304(b) of the Clean Water Act, as amended, 33 U.S.C. § 1314(b) (1976 & Supp. V 1981):

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants; and

(4)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the applicaton of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 1311(b)(2)(E) of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the compari-

son of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, nonwater quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

4. Section 307(b) of the Clean Water Act, as amended, 33 U.S.C. § 1317(b) (1976 & Supp. V 1981):

(b) Pretreatment standards; hearing; promulgation; compliance period; revision; application to State and local laws

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

"FUNDAMENTALLY DIFFERENT FACTORS" VARIANCE REGULATION, 40 C.F.R. § 403.13

§ 403.13 Variances from categorical pretreatment standards for fundamentally different factors.

(a) *Definition.* The term "Requester" means an Industrial User or a POTW or other interested person seeking a variance from the limits specified in a categorical Pretreatment Standard.

(b) *Purpose and scope.* In establishing categorical Pretreatment Standards for existing sources, the EPA will take into account all the information it can collect, develop and solicit regarding the factors relevant to pretreatment standards under section 307(b). In some cases, information which may affect these Pretreatment Standards will not be available or, for other reasons, will not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the limits in categorical Pretreatment Standards, making them either more or less stringent, as they apply to a certain Industrial User within an industrial category or subcategory. This will only be done if data specific to that Industrial User indicates it presents factors fundamentally different from those considered by EPA in developing the limit at issue. Any interested person believing that factors relating to an Industrial User are fundamentally different from the factors considered during development of a categorical Pretreatment Standard applicable to that User and further, that the existence of those factors justifies a different discharge limit from that specified in the applicable categorical Pretreatment Standard, may request a fundamentally different factors variance under this section or such a variance request may be initiated by the EPA.

(c) *Criteria*—(1) *General criteria.* A request for a variance based upon fundamentally different factors shall be approved only if:

(i) There is an applicable categorical Pretreatment Standard which specifically controls the pollutant for which alternative limits have been requested; and

(ii) Factors relating to the discharge controlled by the categorical Pretreatment Standard are fundamentally different from the factors considered by EPA in establishing the Standards; and

(iii) The request for a variance is made in accordance with the procedural requirements in paragraphs (g) and (h) of this section.

(2) *Criteria applicable to less stringent limits.* A variance request for the establishment of limits less stringent than required by the Standard shall be approved only if:

(i) The alternative limit requested is no less stringent than justified by the fundamental difference;

(ii) The alternative limit will not result in a violation of prohibitive discharge standards prescribed by or established under § 403.5;

(iii) The alternative limit will not result in a non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the Pretreatment Standards; and

(iv) Compliance with the Standards (either by using the technologies upon which the Standards are based or by using other control alternatives) would result in either:

(A) A removal cost (adjusted for inflation) wholly out of proportion to the removal cost considered during development of the Standards; or

(B) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the Standards.

(3) *Criteria applicable to more stringent limits.* A variance request for the establishment of limits more stringent than required by the Standards shall be approved only if:

(i) The alternative limit request is no more stringent than justified by the fundamental difference; and

(ii) Compliance with the alternative limit would not result in either:

(A) A removal cost (adjusted for inflation) wholly out of proportion to the removal cost considered during development of the Standards; or

(B) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the Standards.

(d) *Factors considered fundamentally different.* Factors which may be considered fundamentally different are:

(1) The nature or quality of pollutants contained in the raw waste load of the User's process wastewater;

(2) The volume of the User's process wastewater and effluent discharged;

(3) Non-water quality environmental impact of control and treatment of the User's raw waste load;

(4) Energy requirements of the application of control and treatment technology;

(5) Age, size, land availability, and configuration as they relate to the User's equipment or facilities; processes employed; process changes; and engineering aspects of the application of control technology;

(6) Cost of compliance with required control technology.

(e) *Factors which will not be considered fundamentally different.* A variance request or portion of such a request under this section may not be granted on any of the following grounds:

(1) The feasibility of installing the required waste treatment equipment within the time the Act allows;

(2) The assertion that the Standards cannot be achieved with the appropriate waste treatment facilities installed, if such assertion is not based on factors listed in paragraph (d) of this section;

(3) The User's ability to pay for the required waste treatment; or

(4) The impact of a Discharge on the quality of the POTW's receiving waters.

(f) *State or local law.* Nothing in this section shall be construed to impair the right of any state or locality under section 510 of the Act to impose more stringent limitations than required by Federal law.

(g) *Application deadline.* (1) Requests for a variance and supporting information must be submitted in writing to the Director or to the Enforcement Division Director, as appropriate.

(2) In order to be considered, requests for variances must be submitted within 180 days after the effective date of the categorical Pretreatment Standard unless the User has requested a categorical determination pursuant to § 403.6(a).

(3) Where the User has requested a categorical determination pursuant to § 403.6(a), the User may elect to await the results of the category determination before

submitting a variance request under this section. Where the User so elects, he or she must submit the variance request within 30 days after a final de :ision has been made on the categorical determination pursuant to § 403.6(a)(4).

(h) *Contents of submission.* Writtin Submissions for variance request, whether made to the Enforcement Division Director or to the Director must include:

(1) The name and address of the person making th: request;

(2) Identification of the interest of the Requester which is affected by the categorical Pretreatment Standard for which the variance is requested;

(3) Identification of the POTW currently receiving the waste from the Industrial User for which altrnative discharge limits are requested;

(4) Identification of the categorical Pretreatment Standards which are applicable to the Industrial User;

(5) A list of each pollutant or pollutant parameter for which an alternative discharge limit is sought;

(6) The alternative discharge limits proposed by the Requester for each pollutant or pollutant parameter identified in paragraph (h)(5) of this section;

(7) A description of the Industrial User's existing water pollution control facilities;

(8) A schematic flow representation of the Industrial User's water system including water supply, process wastewater systems, and points of Discharge; and

(9) A Statement of facts clearly establishing why the variance request should be approved, including detailed support data, documentation, and evidence necessary to fully evaluate the merits of the request, e.g., technical and economic data collected by the EPA and used in developing each pollutant discharge limit in the Pretreatment Standard.

(i) *Deficient requests.* The Enforcement Division Director or Director will only act on written requests for variances that contain all of the information required. Persons who have made incomplete Submissions will be notified by the Enforcement Division Director or Director that their requests are deficient and unless the time period is extended, will be given up to 30 days to correct the deficiency. If the deficiency is not corrected within the time period allowed by the Enforcement Division Director or the Director, the request for a variance shall be denied.

(i) *Public notice.* Upon receipt of a complete request, the Director or Enforcement Division Director will provide notice of receipt, opportunity to review the submission, and opportunity to comment.

(l) The public notice shall be circulated in a manner designed to inform interested and potentially interested persons of the request. Procedures for the circulation of public notice shall include mailing notices to:

(i) The POTW into which the Industrial User requesting the variance discharges;

(ii) Adjoining States whose waters may be affected; and

(iii) Designated 208 planning agencies, Federal and State fish, shellfish and wildlife resource agencies; and to any other person or group who has requested individual notice, including those on appropriate mailing lists.

(2) The public notice shall provide for a period not less than 30 days following the date of the public notice during which time interested persons may review the request and submit their written views on the request.

(3) Following the comment period, the Director or Enforcement Division Director will make a determination on the request taking into consideration any comments received. Notice of this final decision shall be provided to the requestor (and the Industrial User for which the variance is requested if different), the POTW into which the Industrial User discharges and all persons who submitted comments on request.

(k) *Review of request by state.* (1) Where the Director finds that fundamentally different factors do not exist, he may deny the request and notify the requester (and Industrial User where they are not the same) and the POTW of the denial.

(2) Where the director finds that fundamentally different factors do exist, he shall forward the request, and a recommendation that the request be approved, to the Enforcement Division Director.

(1) *Review of requests by EPA.* (1) Where the Enforcement Division Director finds that fundamentally different factors do not exist, he shall deny the request for a variance and send a copy of his determination to the Director, to the POTW, and to the Requester (and to the Industrial User, where they are not the same).

(2) Where the Enforcement Division Director finds that fundamentally different factors do exist, and that a

partial or full variance is justified, he will approve the variance. In approving the variance, the Enforcement Division Director will:

(i) Prepare recommended alternative discharge limits for the Industrial User either more or less stringent than those prescribed by the applicable categorical Pretreatment Standard to the extent warranted by the demonstrated fundamentally different factors;

(ii) Provide the following information in his written determination:

(A) the recommended alternative discharge limits for the Industrial User concerned;

(B) the rationale for the adjustment of the Pretreatment Standard (includng the Enforcement Division Director's reasons for recommending that a fundamentally different factor variance be granted) and an explanation, of how the Enforcement Division Director's recommended alternative discharge limits were derived;

(C) the supporting evidence submitted to the Enforcement Division Director; and

(D) other information considered by the Enforcement Division Director in developing the recommended alternative discharge limits;

(iii) Notify the Director and the POTW of his or her determination; and

(iv) Send the information described in paragraphs (1)(2)(i) and (ii) of this section to the Requestor (and to the Industrial User where they are not the same).

(m) *Request for hearing.* (1) Within 30 days following the date of receipt of notice of the Enforcement Division Director's decision on a variance request, the Requester or any other interested person may submit a petition to the Regional Administrator for a hearing to reconsider or contest the decision. If such a request is submitted by a person other than the Industrial User the person shall simultaneously serve a copy of the request on the Industrial User.

(2) If the Regional Administrator declines to hold a hearing and the Regional Administator affirms the Enforcement Division Director's findings, the Requester may submit a petition for a hearing to the Administrator within 30 days of the Regional Administrator's decision.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States Environmental Protection Agency, requests an extension of 60 days, to and including February 17, 1984, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit in this case.

The judgement of the court of appeals was entered on September 20, 1983. A copy of the court's opinion is attached.[1] The time for filing a petition for a writ of certiorari, unless extended, will expire on December 19, 1983. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

This case concerns the validity of an Environmental Protection Agency regulation (40 C.F.R. 403.13) permitting variances from national standards limiting the quantity of pol-

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[1] The court's decision (*National Association of Metal Finishers* v. *EPA*, Nos. 79-2256, 80-1008, 81-1210, 81-1279, 81-1351, 81-1712, 81-1977, 81-1978, 81-1979, 81-1981, 81-1982, 81-1983, 81-1984, 81-1985, 81-2119, 81-2150, 81-2151 (3d Cir., Sept. 20, 1983), concerned numerous petitions for review challenging various provisions of the General Pretreatment Regulations and pretreatment standards for the electroplating industry. This application concerns only the Natural Resources Defense Council, Inc. petitions (Nos. 81-1977, 81-1985).

lutants that industrial dischargers may discharge into publicly owned treatment works. An industrial discharger may qualify for a variance from applicable national standards if it can demonstrate that its situation involves factors "fundamentally different" from those considered by the Agency when it established the relevant national standards. Section 307(b) of the Clean Water Act, 33 U.S.C. (& Supp. V) 1317(b), requires the Administrator of EPA to promulgate "pretreatment standards for introduction of pollutants into [publicly owned treatment works] for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works." The pretreatment standards are to apply to categories of industrial sources which introduce such pollutants to treatment works. Because of the complexity in developing national pretreatment standards for various categories of sources under Section 307(b), occasionally the EPA may overlook data showing that a particular plant within a certain category may differ from the plants considered during the rulemaking in ways that affect the plant's ability to comply with the national standards. Accordingly, EPA has promulgated a limited safety valve in its General Pretreatment Regulations, 40 C.F.R. 403.13, by which the Agency may establish more or less stringent standards for an industrial discharger if the discharger can demonstrate that its plant is "fundamentally different" from the plants considered by EPA when it promulgated the relevant national standards.

The Third Circuit held that the variance regulation was unlawful because Section 301(1) of the Clean Water Act, 33 U.S.C. (Supp. V) 1311(1), prohibits the Agency from modifying any requirement applicable to toxic pollutants. The lower court concluded that a variance based on fundamentally different factors, as applied to a toxic pollutant, constitutes a "modification" of otherwise applicable national pretreatment standards and is therefore forbidden by Section 301(1).

The court of appeals' conclusion seems incorrect. Section 301(1) was intended only to prohibit modifications under Sec-

tion 301(c), 33 U.S.C. 1311(c) (modifications based on economic affordability) and 301(g), 33 U.S.C. (Supp. V) 1311(g) (modifications based on water quality considerations. There is no indication that Congress intended to prohibit variances based on fundamentally different factors. Indeed, the court of appeals conceded, "the legislative history of Section 301(1) does indicate that Congress was primarily concerned with prohibiting modifications under Section 301(c) and (g)" (slip op. at 42). Furthermore, prior to the enactment of 301(1) in 1977, the Agency had promulgated similar variance regulations as part of numerous other national rulemakings, and this Court had held in *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), that EPA was required to provide variances from certain national effluent limitations and standards for direct dischargers. There is no hint in the legislative history of the 1977 amendments to the Clean Water Act that Congress sought to end the Agency's administrative practice or overrule this Court's decision in *duPont*.

The Third Circuit's decision also appears to be at odds with the Fourth Circuit's decision in *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (1980). There, the Fourth Circuit rejected the Natural Resources Defense Council's claim that Section 301(1) prohibits EPA from granting similar variances to direct dischargers, *i.e.*, industrial sources that discharge wastes directly into navigable waters instead of into publicly owned sewage treatment works. Thus, under the Fourth Circuit's decision, EPA may grant variances based upon fundamentally different factors for direct dischargers, but under the Third Circuit's decision, the Agency may not grant such variances for indirect dischargers. This disparate treatment contravenes Congress's intent to require EPA to develop a parallel regulatory approach for direct and indirect dischargers.

Because of the importance of this issue to the Agency's development of national pretreatment standards for various industrial categories and the apparent conflict between the circuits, further review by this Court may be warranted. The

additional time is requested in order to permit careful consideration of whether a petition for a writ of certiorari should be filed in this case. The additional time is also needed to confer with interested government agencies, and if a decision to file a petition for a writ of certiorari is reached, to prepare and print the petition.

Respectfully submitted,

REX E. LEE
Solicitor General

DECEMBER 1983

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

Nos. 83-1013, 83-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC,
Respondent;

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITIONS

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April 2, 1984

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QUESTION PRESENTED

Whether the Third Circuit correctly held that Section 301(*l*) of the Clean Water Act, 33 U.S.C. (Supp. V) 1311(*l*), prohibits EPA from granting variances from national pretreatment standards for toxic pollutants.

PARTIES

In addition to those named in the caption, the parties are: American Cyanamid Corporation, FMC Corporation, and Union Carbide Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-1013, 83-1373

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

OPINION BELOW

The opinion of the court of appeals (CMA Pet. App. A1-A96)[1] is reported at 719 F.2d 624.

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, are reproduced at CMA Pet. App. A116-A121 except for Sections 301(c) and (g), 306(b), 307(d), and 509(b)(1), 33 U.S.C. (& Supp. V) 1311(c) and (g), 1316(b), 1317(d), and 1369(b)(1), which are set forth in the Appendix at A1–A4. The "fundamentally different factors" (FDF) variance provision, 40 C.F.R. 403.13, is reproduced at CMA Pet. App. A122-A127.

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[1] "CMA Pet. App." refers to the appendix to the petition in No. 83-1013. The two petitions from the decision below are distinguished herein by reference to the petitioner. Thus, "CMA Pet." refers to the petition in No. 83-1013 filed by the Chemical Manufacturers Association, *et al.* "EPA Pet." refers to the petition in No. 83-1373 filed by the United States Environmental Protection Agency.

STATEMENT OF THE CASE

The Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et. seq.*, directs EPA to control two types of industrial polluters: (1) "direct" dischargers, which dump their waste water directly into navigable waters, and (2) "indirect" dischargers, which dump their waste water into municipal sewage treatment plants which, in turn, discharge to navigable waters.

When the law was first enacted, Congress required direct dischargers to meet two progressively more stringent technology-based requirements: "best practicable control technology currently available" (BPT) by July 1, 1977, and "best available technology economically achievable" (BAT) by July 1, 1983 (later amended to July 1, 1984). 33 U.S.C. (& Supp. V) 1311(b)(l)(A) and (b)(2)(A) and (C). Indirect dischargers had to meet "pretreatment standards" designed to protect both the environment and the sewage treatment plant. 33 U.S.C. 1311(b)(1)(A) and (2)(A) and 1317(b). The pretreatment standards were especially important because municipal sewage plants are often not designed to treat industrial waste water. Without pretreatment, toxic industrial chemicals can pass through the sewers into rivers and drinking water supplies, contaminate large volumes of sludge, or impair the effectiveness of the sewage treatment plant, negating the benefits of a multi-billion dollar investment in pollution control. *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 690-691 (1978) [hereinafter cited as 1977 *Legis. Hist.*]

In 1977, Congress took stock of the law, finding reason for both solace and alarm. Progress controlling conventional pollutants, the principal targets of BPT requirements, had been greater than anticipated. *Id.* at 330, 335, 1101. However, EPA had not issued the pretreatment standards on schedule, to the consternation of both houses of Congress. *Id.* at 691, 1213. In addition, the principal regulatory mechanism for control of toxics had failed, amidst mounting evidence of the seriousness and ubiquity of these pollutants. *Id.* at 325-326, 334, 452.

Congress therefore ordered a "major redirection and refinement" of EPA's regulatory program to strengthen control of toxics. *Id.* at 326. First, it elevated the importance of pretreatment and BAT requirements. It directed EPA to use these requirements to control toxics and, in the case of pretreatment standards, enacted several strengthening amendments. *Id.* at 689-693. Second, it considered when, and under what conditions, sources should be able to obtain variances from BAT and pretreatment requirements. It created a new "safety valve" to give flexibility to BAT limitations,[2] and amended a BAT variance provision that had been in the 1972 law,[3] specifying in each case that these modifications would not be available for toxic pollutants. It did not create any variances from the pollution control requirements of pretreatment standards, but it did allow indirect dischargers to get a "credit" for removal occurring at the municipal sewage treatment plant, in effect splitting the pollution control between the indirect discharger and the sewage treatment plant.[4] Simultaneously, it enacted Section 301(*l*), 33 U.S.C (Supp. V) 1311(*l*), which said: "The Administrator may not modify any requirement of this section as it applies to any [toxic] pollutant ***." It stressed that EPA could only modify requirements for non-toxic, conventional pollutants, and urged EPA to err on the side of caution in applying this mandate.[5]

Despite these directives, EPA subsequently issued regulations which allowed industries to obtain variances from pretreatment standards for toxic pollutants. 40 C.F.R. 403.13

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[2] Section 301(g), 33 U.S.C. (Supp. V) 1311(g), p. A1, *infra*; 1977 *Legis. Hist.*, *supra*, at 674-675.

[3] Section 301(c), 33 U.S.C. 1311(c), p. A1, *infra*; 1977 *Legis. Hist.*, *supra*, at 328-329.

[4] Section 307(b), 33 U.S.C. (Supp. V) 1317(b); 1977 *Legis. Hist.*, *supra*, at 461-462.

[5] *E.g.*, "In order to reemphasize that modifications to BAT are intended for non-toxic, conventional pollutants only, the bill prohibits variances for [toxic] pollutants***. The committee's intent is to prohibit both those pollutants known to be toxic or hazardous and those suspected of being toxic or hazardous." 1977 *Legis. Hist.*, *supra*, at 677.

(CMA Pet. App. A122-A127).[6] The Third Circuit held that these so-called "fundamentally different factors" or "FDF" variances violated Section 301(*l*).

REASONS FOR DENYING THE PETITIONS

The Third Circuit's decision does not conflict with the decision of any other Circuit, is entirely consistent with this Court's prior interpretation of the Clean Water Act, does not present issues sufficiently important to warrant this Court's attention, and is required by the express language of the statute and the legislative history. Review by this Court is not warranted.

1. The Third Circuit's decision does not conflict with the decision of any other Circuit.

a. The Third Circuit held that Section 301(*l*) prohibits variances from *pretreatment* standards for toxic pollutants. No other court of appeals has addressed the applicability of Section 301(*l*) to pretreatment standards, since all challenges to the variance provision for the pretreatment program were consolidated in the Third Circuit. There is no conflict among the Circuits on this question; hence EPA's fear of "substantial uncertainty and confusion" (EPA Pet. 8) is a non sequitur.

b. Lacking any conflict between the holdings of the Circuits, petitioners complain that the Third Circuit's reasoning is inconsistent with that used by the Fourth Circuit to validate variances from *BPT limits* for toxic pollutants. See *Appalachian Power Co.* v. *Train*, 620 F.2d 1040, 1047-1048 (1980).[7] Even if a difference in reasoning between the Circuits were sufficient to warrant this Court's review, no purpose would be served by reviewing the reasoning of either Circuit. The Fourth Circuit wrestled with an issue which will not recur: whether Congress, focused on the future direction of the pollution control program, intended Section 301(*l*) to apply

[6] The regulations were issued on June 26, 1978, 43 Fed. Reg. 27736-27773, and amended on January 28, 1981, 46 Fed. Reg. 9404-9460.

[7] Petitioners did not even cite *Appalachian Power's* discussion of § 301(*l*) to the Third Circuit, thus belittling its importance to this case.

retroactively to BPT limits issued before the 1977 amendments. It concluded that Congress did not, relying heavily on the maxim that retroactive application of a statute is not favored. *Id.* at 1047.

That anomaly is not present here, where the pretreatment standards were developed well after the 1977 amendments, nor will it recur in the programs for either direct or indirect dischargers. The focus of the national clean water program shifted in 1977 from development of BPT limits to BAT and pretreatment. The Third Circuit gave EPA a clear directive on how to proceed with the post-1977 standards; there is no contrary directive from any other court.[8]

2. The Third Circuit's decision does not conflict with any decision of this Court.

a. This case has nothing to do with this Court's decision in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). *DuPont* addressed two questions: whether EPA had authority to issue industry-wide regulations for existing plants under the Clean Water Act—it held that EPA had; and whether nonstatutory variances were available for industry-wide standards for new sources under the same Act—it held that they were not.

The question before the Third Circuit was whether Section 301(*l*), enacted after *duPont*, prohibits FDF variances from pretreatment standards for toxic pollutants. This turns on the meaning of Section 301(*l*), something *duPont* could not address. Therefore, it is not surprising that the Third Circuit's decision does not even address *duPont* in its discussion of Section 301(*l*). (CMA Pet. App. A40-A43).

DuPont is, of course, relevant to the issue that the Third Circuit declined to address. NRDC argued below that all FDF variances from pretreatment standards were illegal. The Third

[8] A pending case in the D.C. Circuit may raise the issue of the applicability of § 301(*l*) to BAT requirements for direct dischargers. This case was placed on the court's inactive docket and, regardless of how it is ever resolved, will not affect the pretreatment standards at issue here. *NRDC, et al.* v. *EPA*, Nos. 80-1607, *et al.*

Circuit found it unnecessary to reach this issue because it found that EPA had only issued pretreatment standards for toxic poilutants and these cannot be varied due to the restriction in Section 301(*l*). (CMA Pet. App. A38-A40). EPA has since issued a new FDF variance rule which restricts the availability of the variance to pretreatment standards for nontoxic pollutants. 49 Fed. Reg. 5131-5132 (February 10, 1984). There has been no judicial review of this rule; hence, review by this Court would be premature.

b. Petitioners' arguments are at odds with *duPont*. *DuPont* tried to reconcile the Clean Water Act's description of BPT as a requirement applicable to "point sources" with the overall statutory scheme which calls for BAT (and pretreatment and new source standards) to be set for "categories and classes" of sources. The Court concluded that BPT, like BAT, can be set by industry-wide regulations "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations." 430 U.S. at 128. *DuPont* did not, as EPA claims, hold that nonstatutory variances are appropriate for BAT requirements. To the contrary, the Court upheld EPA's BAT limits even though they did not contain an FDF variance clause.[9]

Dupont did, however, strike down nonstatutory variances for new source standards for reasons equally applicable to pretreatment standards. Both pretreatment and new source standards are set for categories of sources, rather than individual point sources. Cf. § 307(b)(3), 33 U.S.C. 1317(b)(3), with § 306(b), 33 U.S.C. 1316(b), p. A2–A3, *infra*. The pretreatment, unlike BPT limits, are expressly labelled "standards" in the Act. *Id*. Pretreatment, like new source, standards may require "no discharge."[10] As with new source standards,

[9] As the Court explained, "The regulations for each subcategory contain a variance clause, *applicable only to the [BPT] limitations*." 430 U.S. at 122-123 (emphasis added).

[10] Section 307(b)(1), 33 U.S.C. 1317(b)(1), specifies that a pretreatment standard must "*prevent* the discharge of *any* pollutant *** which *** interferes with, passes through, or otherwise is incompatible with [the publicly owned treatment works]." (emphasis added).

it is "unlawful for *any* owner or operator of *any* source to operate *any* source in violation of" a pretreatment standard. Section 307(d), 33 U.S.C. 1317(d), p. A4, *infra* (emphasis added). Finally, there is no statutory provision for variances,[11] and a variance provision would be inappropriate because pretreatment, like new source, standards were intended to ensure national uniformity and maximum feasible control.[12] See generally 430 U.S. at 138.

c. This Court has twice spoken on the subject of variances under the Clean Water Act. *DuPont*, *supra*, and *EPA* v. *National Crushed Stone Assn.*, 449 U.S. 64 (1980).[13] Its decisions are clear and do not conflict with the Third Circuit's decision. There is no need once again to address variances under this Act.

3. The FDF variance for indirect dischargers is not sufficiently important to warrant this Court's attention.

a. Few companies are interested in the FDF variance. Approximately 11,316 indirect dischargers (83% of the total)[14] were covered by categorical pretreatment standards when the

[11] Sources may be able to get a "credit"' for pollutant removal occurring at the publicly owned treatment works, § 307(b)(1), 33 U.S.C. (Supp. V) 1317(b)(1), but there are no exceptions to the level of control demanded by the standards.

[12] The Senate Committee explained the rationale for pretreatment standards as follows: "The only way to avoid [the contaminated sludge disposal] problem is to prevent, *to the maximum extent feasible*, the industrial pollutants from entering [the municipal sewage] plant in the first place." 1977 *Legis. Hist.*, *supra*, at 690 (emphasis added). Thus, pretreatment standards are set at the national level, with EPA responsible for seeing that local authorities ensure, at a minimum, compliance with the federal limits. *Id*. at 461, 691-693.

[13] *National Crushed Stone Assn*. held that the considerations underlying BPT and BAT differed; therefore, EPA could not grant BPT variances based on the economic capability of the individual discharger, even though it could grant statutory BAT variances on these grounds.

[14] In 1977, when this rulemaking began, EPA estimated that 60,000 industrial facilities would be covered by categorical pretreatment standards; it now believes that 13,696 is a more accurate estimate. (p. A5–A6, *infra*).

court of appeals rendered its decision.[15] Only 12 companies had applied for an FDF variance.[16]

b. The decision below will have no adverse impact on the administration of the Clean Water Act. It will not, as petitioners theorize, make "existing regulations *** more vulnerable to challenge by plants affected by fundamentally different factors." (EPA Pet. 11). Deadlines for filing FDF variance applications had expired for over 80% of the sources in the program when the court of appeals rendered its decision. Since only a handful of companies applied, few are situated to challenge the regulations because of alleged differences with other plants in the same industrial category. No useful purpose would be served—indeed, it would delay enforcement of this program—to allow these plants to raise excuses for noncompliance for the first time now that EPA's rules are final.

c. Nor will the decision below affect EPA's ability to issue new pretreatment standards in compliance with the Agency's "stringent deadlines." (EPA Pet. 11) In the first place, since few indirect dischargers avail themselves of the FDF variance, incorporating their concerns in the national rulemaking will not significantly burden EPA.

Second, EPA routinely considers unique features of individual plants in establishing national rules for both direct and indirect dischargers, notwithstanding its desire to focus "on the more typical plants." (EPA Pet. 12). Indeed, requests to establish separate subcategories for one or a few plants which are somehow "different" from others in the same industrial category are a common feature of these rulemakings.[17]

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[15] An additional 329 indirect dischargers are covered by standards issued since the court of appeals decision, although no additional variance applications have been filed. (pp. A5–A7, *infra*).

[16] P. A7, *infra*. One company filed variance applications for two plants; another, for 24 plants.

[17] See, *e.g.*, *Association of Pacific Fisheries* v. *EPA*, 615 F.2d 794, 808 n.10 (9th Cir. 1980) (subcategories divided for analytical purposes into subdivisions of one, two, or three plants); *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1246 (10th Cir. 1979) (subcategorization of two mills was

(footnote continues)

Finally, the courts below have repeatedly extended EPA's deadlines—often with the express consent of NRDC—where the Agency could identify legitimate problems with its data base.[18] There is no reason to believe that they will act any differently in the future, should the data show that some plants present unique compliance problems which merit more extended consideration.

d. The cases petitioners cite do not help their cause. They are either irrelevant[19] or suggest that EPA does not need an FDF variance for the reasons claimed (*i.e.*, for subcategorizing "based on factors that would have justified, if not required, the creation of that subcategory during the rulemaking *had EPA been aware of and taken those factors into*

(footnote continued)

arbitrary); *American Iron and Steel Institute* v. *EPA*, 526 F.2d 1027, 1050-1051, (3d Cir. 1975), modified, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978) (addressed sole plant in country with water supply problem). Indeed, subcategorization has been one of the most frequently disputed issues in litigation over EPA's effluent limitations. Report of the Effluent Standards and Water Quality Information Advisory Committee, reprinted in *Implementation of the Federal Water Pollution Control Act, Hearings Before the Subcomm. on Investigations and Review of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. 197-208 (1976).

[18] EPA's deadlines are embodied in a consent decree entered into with NRDC and approved by the district court in 1976. *NRDC* v. *Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), modified *sub nom. NRDC* v. *Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979), modified *sub nom. NRDC* v. *Gorsuch*, Nos. 2153-73, *et al.* (D.D.C. Oct. 26, 1982), modified *sub nom. NRDC* v. *Ruckelshaus*, Nos. 2153-73, *et al.* (D.D.C. Aug. 2, 1983 and Jan. 6, 1984). A petition for certiorari, filed by industries challenging provisions of the consent decree other than the deadlines, is now pending before this Court. *Union Carbide Corp., et al.*, v. *Natural Resources Defense Council, Inc., et al.*, No. 83-1345.

[19] None of the cases petitioners cite address Section 301(*l*). Moreover, *American Iron and Steel Institute*, n.17 *supra*, predated enactment of Section 301(*l*); *Weyerhauser Co.* v. *Costle*, 590 F.2d 1011 (D.C. Cir. 1978) addressed only nontoxic pollutants; and *Kennecott*, 612 F.2d at 1243, upheld EPA's industry-wide standards relying, in large part, on the statutory obligation to base effluent guidelines on the "best plant," rather than on the FDF variance.

account"). (EPA Pet. 15) (emphasis added).[20] Instead, EPA used the FDF variance as a fig leaf for embarrassingly discordant facts already in the record.[21] This bureaucratic concern, rather than any "issue of fundamental importance to the administration of the Clean Water Act," propels EPA's petition.[22]

4. The court of appeals correctly decided that the Clean Water Act prohibits FDF variances from pretreatment standards for toxic pollutants.

Petitioners argue that the court below erred by not accepting EPA's construction of Section 301(*l*) of the Clean Water Act. An agency's interpretation of a statute is not, however, entitled to deference where, as here, it contradicts

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[20] Both *Kennecott* and *AISI* placed the burden of marshalling information squarely on industry's shoulders. When EPA encountered factors of which it had not been aware (*e.g.*, ferrocyanide formation, 612 F.2d at 1245; water scarcity, 526 F.2d at 1050; and engineering factors, 526 F.2d at 1049), the courts found fatal fault with industry's failure to produce adequate information during the rulemaking.

[21] *E.g.*, in *Kennecott*, EPA fell back on the FDF variance when confronted with countervailing factors which it had been "fully aware of" for nearly two years before completing the rulemaking. 612 F.2d at 1243; 43 Fed. Reg. 29771 (1978). Likewise, in *AISI*, 526 F.2d at 1061, EPA proffered the FDF variance in response to industry criticism of its sinter plant data base, even though the flaw at issue had been clearly pointed out to EPA during the rulemaking. 39 Fed. Reg. 24114, 24115 (1974).

[22] CMA also cites *SEC* v. *Chenery*, 332 U.S. 194 (1947), arguing that EPA should have discretion to choose whether to regulate atypical plants through general rules or individual, *ad hoc* decision-making. *Chenery*, however, is irrelevant because here Congress made the choice for EPA. Congress told EPA to issue standards which prevent harmful pollutants from entering municipal sewage treatment plants, and to "designate the category or categories to which such standard shall apply." Section 307(b)(3), 33 U.S.C. 1317(b)(3). In fact, Congress expressly said that the pretreatment standards "would be national in scope and addressed to the most significant pretreatment problems. [They] would vary with the broad type of treatment processes used, but the Committee does not intend that each individual treatment works would have its pretreatment standards set up by the Administrator." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Cong. Research Service, Comm. Print No. 1, 93d Cong., 1st Sess. 800 (1973).

the clear language of the statute,[23] is not well-reasoned,[24] and frustrates the statutory scheme for strict control of toxic pollutants.[25]

a. Section 301(*l*) of the Clean Water Act is clear: it provides that EPA "may not modify any requirement of [Section 301] as it applies to" a toxic pollutant. Pretreatment standards are indisputably requirements of Section 301. EPA's FDF variance would nonetheless have allowed EPA "on a case-by-case basis" to "adjust" pretreatment standards, making them less stringent for some plants.[26] Relying on both the common usage of the language and the legislative history, the court of appeals correctly ruled that these changes "modify" pretreatment standards so as to fall within the prohibition of Section 301(*l*). (CMA Pet. App. A40-A43).

b. EPA's construction of the statute, by comparison, is a house of cards. First, EPA draws a negative inference: because Sections 301(c) and (g) use the term "modification,"[27] Congress must have intended to rule out these statutorily created variances, not "nonstatutory" variances such as the FDF. This argument violates the well-established rule that, where Congress has expressly created exceptions to a statute, "nonstatutory" exceptions are not available. *TVA* v. *Hill*, 437 U.S. 153, 188 (1978). In addition, it makes Section 301(*l*) largely redundant — at least insofar as it applies to Section 301(g), which by its terms cannot be applied to toxics.

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[23] *SEC* v. *Sloan*, 436 U.S. 103, 117-119 (1978).

[24] *U.S.* v. *Cartwright*, 411 U.S. 546, 557 (1973).

[25] *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272-275 (1968) (rejected narrow reading of statutory provision because it did not square with the structure of the statute).

[26] 40 C.F.R. 403.13(b). (CMA Pet. App. A122). The rules would also have allowed EPA to make pretreatment standards "more stringent," but this addition is purely disingenuous, as all FDF variance applications for both direct and indirect dischargers have sought weaker, not stronger, pollution control limits.

[27] Section 301(c), 33 U.S.C. 1311(c), p. A1, *infra*, allows BAT standards to be modified if they surpass the economic capability of the discharger. Section 301(g), 33 U.S.C. (Supp. V) 1311(g), p. A1–A2, *infra*, allows similar modifications to BAT standards where water quality warrants.

Next, EPA asserts that an FDF variance is not a "modification;" admittedly, "a Member of Congress" used the words "variance" and "modification" interchangeably during floor debate,[28] but this, says EPA, does not suggest that the whole of Congress thought the terms were akin. The speaker was, however, Senator Muskie, Chairman of the Subcommittee on Environmental Pollution and principal author of the 1977 amendments on toxics. His words, entitled to considerable weight on their own, are buttressed here by EPA's own interchangeable use of "variance" and "modification" in its Senate testimony,[29] and the equation of the two terms by both the Senate Committee[30] and this Court.[31]

Last, EPA asserts its "most telling" point: Congress did not criticize either the "well-established" practice of granting FDF variances from BPT requirements, or this Court's *duPont* decision when it enacted Section 301(*l*). EPA's practice was, however, hardly "well-established." Less than 50 of 4,000 major industrial dischargers covered by BPT limits before 1977 had applied for FDF variances; only two plants had actually received a variance. (p. A8–A9, *infra*). Nor would *duPont* have caused Congress to be concerned about variances for BAT and pretreatment requirements since the BAT limits reviewed in *duPont* contained no FDF variance clause (even though the BPT limits did). 430 U.S. at 122-123.

Congress's failure to examine the further theoretical availability of FDF variances in the BPT rules proves nothing. BPT was merely an interim measure before final pollution controls. 1977 *Legis. Hist.*, *supra*, at 459. Since most sources had complied, *Id.* at 641, and the pollution control results had been greater than anticipated, *Id.* at 330-331, Congress had no need to examine carefully EPA's handling of individual dischargers.

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[28] 1977 *Legis. Hist.*, *supra*, at 461.

[29] *Id.* at 1102. EPA called the statutory 301(c) modification provision a "variance."

[30] *Id.* at 676-677. The Committee called the statutory 301(g) modification provision a "variance."

[31] In *National Crushed Stone Assn.*, *supra*, this Court referred to the statutory 301(c) modification provision as a "variance."

Moreover, BPT (and the early BAT limits) focused primarily on conventional pollutants, not toxics. *Id.* at 335, 1101. Both Congress's and EPA's attention in 1977 shifted sharply toward control of toxic pollutants and the BAT and pretreatment requirements designed to control them. *Id.* at 1135-1136. Since Congress considered, and curtailed, the circumstances under which these requirements could be modified, it does not make sense to assume that Congress, without mention, would have simultaneously authorized EPA to grant nonstatutory variances for toxic pollutants.

c. Lacking a compelling legal argument, EPA turns to policy, alleging that an FDF variance functions differently from a modification. Put simply, this argument supposes that an FDF variance is not a "variance" at all, but rather a part of the standard-setting process in which EPA recognizes prior errors. The Clean Water Act, however, contains statutory mechanisms for correcting EPA's rulemaking errors. The Act requires EPA to revise its rules following the same streamlined, informal rulemaking procedures used to set pretreatment standards in the first place.[32]

Congress's solution to the problem of rulemaking error is both more direct and more uniform than the variance route EPA created. The FDF variance procedure entails review by four separate tiers of government, an informal public comment period, a hearing, and coordination between EPA's rulemaking experts and diffuse state and regional office personnel.[33] Not surprisingly, the process has been extraordinarily slow of resolution.

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[32] Section 307(b)(2), 33 U.S.C. 1317(b)(2), directs EPA to revise pretreatment standards "from time to time, as control technology, processes, operating methods, or other alternatives change," following the same procedures used to set pretreatment standards in the first place. In addition, section 509(b)(1), 33 U.S.C. 1369(b)(1), p. A4, *infra*, gives aggrieved sources 90 days to ask a court to remand EPA's rules unless the challenge is based on information arising after 90 days.

[33] An application is reviewed by the state, the EPA Enforcement Division Director, the EPA Regional Administrator, and the EPA Administrator. 40 C.F.R. 403.13. (CMA Pet. App. A122).

Experience with BPT requirements shows that once a plant files an FDF variance application, it enters a regulatory limbo. Plants which applied for an FDF variance from BPT requirements before 1980 are still awaiting EPA's decision.[34] Some of these applications date to 1976 and 1977. As long as EPA demurs, the applicants are unwilling to make the required capital expenditures for pollution controls. This creates inequity within regulated industries since companies which postpone pollution control expenditures gain a competitive edge over those which pay to install, operate, and maintain controls.

Experience also shows that many variance applications lack merit.[35] Yet variance applications delay enforcement efforts,[36] permitting toxic discharges to continue in excess of the limits intended by Congress. In addition, they reward companies which fail to bring relevant information to EPA's attention during a rulemaking. Congress therefore took a dim view of variances, labelling them "resource-intensive" and "time consuming"[37] and carefully circumscribing, through Section 301(*l*), their availability where toxic pollutants are concerned.

Petitioners' construction of the Act ignores the clear language of Section 301(*l*), is inconsonant with the overall statutory scheme for strict control of toxic pollutants, and

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[34] Variance applications 76-09, 77-06, 77-14, 77-15, 77-16, 78-02, 78-05, 79-01, and 79-03 are still pending, according to EPA's January 31, 1984 status report.

[35] *E.g.*, EPA approved only four of the 53 BPT variance applications. Fourteen were denied; 16 withdrawn. The rest are still pending. (p. A8-A9, *infra*).

[36] Congress rejected a proposal for case-by-case extensions of the 1977 deadline for meeting BPT limits for this very reason. At the end of EPA's decision-making process, those denied a variance would "almost certainly" appeal to the courts, perhaps obtaining a stay from the applicable requirement. This, in turn, would mean that "these discharges would continue unabated until final judicial resolution, first of the variance, and then, if necessary, of the ensuing enforcement order." 1977 *Legis. Hist.*, *supra*, at 861-862.

[37] *Id.* at 861-862.

would give a handful of companies an unfair competitive advantage over the more than 11,000 sources now embarking on a pollution control program. The Third Circuit correctly rejected it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
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April 2, 1984

APPENDIX

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CLEAN WATER ACT PROVISIONS

1. Section 301(c) of the Clean Water Act, as amended, 33 U.S.C. 1311(c):

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July !, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

2. Section 301(g) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(g):

(g)(1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 304(a)(4) of this Act, toxic pollutants subject to section 307(a) of this Act, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) Such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which

may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time-period as he is eligible to apply for a modification under this subsection.

3. Section 306(b) of the Clean Water Act, as amended, 33 U.S.C. 1316(b):

(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall at the minimum, include:

pulp and paper mills;
paperboard, builders paper and board mills;
meat product and rendering processing;
dairy product processing;
grain mills;
canned and preserved fruits and vegetables processing;
canned and preserved seafood processing;
sugar processing;
textile mills;
cement manufacturing;
feedlots;
electroplating;
organic chemicals manufacturing;
inorganic chemicals manufacturing;
plastic and synthetic materials manufacturing;
soap and detergent manufacturing;
fertilizer manufacturing;
petroleum refining;
iron and steel manufacturing;

nonferrous metals manufacturing;
phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

4. Section 307(d) of the Clean Water Act, as amended, 33 U.S.C. 1317(d):

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

5. Section 509(b)(1) of the Clean Water Act, as amended, 33 U.S.C. 1369(b)(1):

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

ESTIMATED NUMBER OF INDIRECT DISCHARGERS SUBJECT TO CATEGORICAL PRETREATMENT STANDARDS

INDUSTRY CATEGORY	ESTIMATED NUMBER OF INDIRECT DISCHARGERS	FINAL STANDARD
Metal Finishing/Electroplating	10,200	X
Iron and Steel	96	X
Leather Tanning and Finishing	140	X
Aluminum Forming	59	X
Pulp and Paper Mills	250	X
Inorganic Chemicals	44	X
Porcelain Enameling	89	X
Copper Forming	32	X
Organic Chemicals and Plastics	470	—
Textile Mills	930	X
Petroleum Refining	53	X
Foundries	360	—
Coil Coating I and Canmaking	32	X
Electrical and Electronic Components	240	X
Battery Manufacturing	190	—
Nonferrous Metals	63	—
Coal Mining	0	X
Ore Mining	0	X
Steam Electric Power Plants	93	X
Pesticides	38	—
Timber Products	47	X
Pharmaceuticals	270	X
TOTAL	13,696	

PERCENT OF INDUSTRIES COVERED BY FINAL STANDARDS 93.8%

These numbers are estimates provided by EPA's Effluent Guidelines Division. Standards have yet to be proposed for Plastics, Molding & Forming and Nonferrous Metals Forming categories.

[Thirteen categorical pretreatment standards, affecting 11,316 sources, were final in September 1983 when the Third Circuit rendered its decision.]

March 22, 1984

Jim Gallup
National Pretreatment Coordinator
U.S. Environmental Protection Agency
Waterside Mall, West Tower
401 M Street SW
Washington, DC 20460

Dear Jim:

I am writing in response to your request that we provide you with the results of our Freedom of Information Act requests to EPA's Regional Pretreatment Coordinators. On February 23, 1984, we requested the Regional Pretreatment Coordinators to provide us with the following:

"The identity of any indirect dischargers in your Region (or in delegated state programs in your Region) who have sought an FDF variance from a categorical pretreatment standard."

The responses we received were prepared between February 29 and March 10, 1984. They indicate that a total of 12 companies applied for a variance. Most companies filed for a single plant, although one company filed for two of its plants, and another for 24 plants. In addition, another company filed, and then withdrew, an application.

Attached are copies of the responses from each Region so that you can see which companies are involved.

Sincerely,

Frances Dubrowski
Senior Attorney

cc: Bill Corcoran
Phil Cummings
John Doyle
Bob Hurley
Ron Outen
Charlene Sturbitts
Errol Tyler

[Letter dated February 17, 1984 from Steadman M. Overman, Director, EPA's Office of Legislative Analysis, to Honorable Arlan Stangeland, House of Representatives, enclosing EPA's responses to the questions submitted by Rep. Stangeland to Administrator William D. Ruckelshaus following the latter's testimony before the House Subcommittee on Water Resources.]

*****

Question: *** To what extent has the Agency, in the course of implementing the Act since 1972, employed fundamentally different factor variances in implementing the Clean Water Act? How many variances have been issued? For what types of pollutants and which industrial categories? (Please provide a detailed response for the record)

Response: ***** Since the promulgation of effluent limitations guidelines regulations (guidelines) (sic) and the implementation of these guidelines in NPDES permits, there have been 53 FDF determination requests for direct dischargers submitted to EPA Headquarters for approval; there have been four approved, 14 denied, 16 withdrawn and 19 pending requests.

The information requested on the four FDF determination requests for direct dischargers that have been approved appears on the next page.

Facility	Date of Approval	Point Source Category	Pollutants
Southern California Edison Huntington Beach Generating Station	2/22/77	Steam Electric Generating (40 CFR & 423.32(b)(6) (1974)–Boiler Blowdown	Total Suspended Solids, Oil & Grease, Total Iron, Total Copper
Southern California Edison San Onofre Nuclear Generating Station	2/22/77	Steam Electric Generating (40 CFR & 423.32(b)(6) (1974)–Boiler Blowdown	Total Suspended Solids, Oil & Grease, Total Iron, Total Copper
Birdsall Sand and Gravel, Oral, South Dakota	7/10/78	Construction Sand and Gravel Subcategory of Mineral Mining and Processing	Total Suspended Solids
Freeport Chemical Company, Uncle Sam Louisiana	6/3/81	Phosphate Subcategory of Fertilizer Manufacturing	Total Phosphorus Fluoride, Total Suspended Solids

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APR 2 1984

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Nos. 83-1013 and 83-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Chamber of Commerce of the United States hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessary because the respondent, Natural Resources Defense Council, Inc., declined to consent to the filing of the brief. The petitioners, Chemical Manufacturers Associa-

tion, *et al.* and the Environmental Protection Agency, have consented to the filing.[1]

This case arose out of the Environmental Protection Agency's ("EPA" or "Agency") regulations governing the establishment of "fundamentally different factors" ("FDF") variances from national pretreatment standards. 40 C.F.R. § 403.13 (1983). The issue presented in this case involves a critical question of statutory construction which goes to the very heart of how EPA administers the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 (1978), that is whether § 301(*l*) of the CWA, 33 U.S.C. § 1311(*l*), prohibits EPA from granting FDF variances for any toxic pollutant.

The scope of this issue extends beyond industries covered by pretreatment standards ("indirect dischargers") promulgated by EPA under § 307(b) of the CWA, 33 U.S.C. § 1317(b), and is of interest to all industries regulated by the CWA. The Third Circuit's holding that EPA is prohibited from issuing such variances has a pronounced effect upon industries covered by effluent guidelines ("direct dischargers") promulgated under § 304(b) of the CWA as well. 33 U.S.C. § 1314(b).

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. Chamber membership exceeds 200,000, including over 195,000 corporations, partnerships and proprietorships as well as over 3,900 trade associations, and local and state chambers. The Chamber regularly presents its views before this Court and the lower federal courts.[2]

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[1] A copy of the Government's consent letter is being filed simultaneously with the attached brief. Counsel for the Chemical Manufacturers Association has consented orally to the filing.

[2] *See, e.g., Trans World Airlines, Inc.* v. *Thurston*, 713 F.2d 940 (2d Cir. 1983), *cert. granted*, 52 U.S.L.W. 3625 (U.S. Feb. 27, 1984) (No. 83-997), *Bowen* v. *U.S. Postal Service*, —— U.S. ——, 74 L.Ed.2d 402 (1983); *Amoco Production Co.* v. *NLRB*, 613 F.2d 107 (5th Cir. 1980).

Both pretreatment standards and effluent guidelines apply to twenty-one major industries and cover sixty-five priority or "toxic" pollutants or groups of pollutants. Many of the Chamber's member companies belong to these industrial groups and are subject to EPA regulation through pretreatment standards and effluent guidelines. Representative industries include coal companies, iron and steel manufacturers and petroleum refineries.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interest of industry in this case. The decision of the Third Circuit to strike down the use of FDF variances for toxic pollutants in this case has a significant impact upon the membership of the Chamber and the industrial community as a whole.

The Chamber believes it is important for this Court to recognize the significance of this issue to industry in general. It is for this reason that the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit holds that § 301(*l*) of the Clean Water Act prohibits FDF variances for toxic pollutants. This decision is fundamentally at odds with *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (4th Cir. 1980), and conflicts in principal with the decision of this Court in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). By eliminating the flexibility this Court found so crucial to setting industry-wide regulations under the Clean Water Act, the Third Circuit decision calls into question the legality of existing regulations and the ability of future regulations to be fully representative of industry as a whole.

The Third Circuit's sweeping misinterpretation of section 301(*l*) of the Clean Water Act goes to the very heart of how the Environmental Protection Agency ("EPA") develops industry-wide regulations for all industrial dischargers, not just those subject to pretreatment standards. The Third Circuit decision not only invalidates the use of FDF variances from pretreatment standards, but also jeopardizes the use of FDF variances generally, thereby threatening EPA's entire regulatory scheme under the Act.

ARGUMENT

The Environmental Protection Agency ("EPA" or "Agency") regulates two types of industrial dischargers under the Clean Water Act ("CWA" or "Act"). 33 U.S.C. § 1251 (1978). Industries that discharge wastewater directly into waters of the United States ("direct dischargers") are subject to effluent limitations guidelines promulgated under § 304(b) of the CWA. 33 U.S.C. § 1314(b). Industries that discharge into publicly-owned treatment works ("indirect dischargers") are subject to pretreatment standards promulgated under § 307(b) of the Act. 33 U.S.C. § 1317(b).

Both effluent limitations guidelines ("effluent guidelines" or "guidelines") and pretreatment standards are requirements of § 301 of the CWA, 33 U.S.C. § 1311 (b)(2)(A)(i) and (ii), and are based on two levels of water pollution control technology. By July 1, 1977, direct dischargers had to achieve effluent limitations based on the "best practical control technology currently available ("BPT")." 33 U.S.C. § 1311(b)(1)(A). By July 1, 1984, direct dischargers will have to achieve effluent limitations based on the "best available technology economically achievable ("BAT")." 33 U.S.C. § 1311(b)(2)(A).

Although not required by statute, EPA and the respondent, Natural Resources Defense Council, Inc. ("NRDC"), adopted in a consent decree the BPT/BAT approach for developing pretreatment standards for indirect dischargers. *NRDC* v. *Train*, 8 ERC 2120 (D.D.C. 1976), *modified sub nom. NRDC* v. *Costle*, 12 ERC 1833 (D.D.C. 1979), *modified sub nom. NRDC* v. *Gorsuch*, 12 ELR 20570 (D.D.C. 1982), *modified sub nom. NRDC* v. *Ruckelshaus*, 14 ELR 20185 (D.D.C. 1984). ("the NRDC Consent Decree"). EPA has developed pretreat-

ment standards according to this BPT/BAT approach since 1977.[1]

EPA develops effluent guidelines and pretreatment standards on an industry-wide basis according to specified statutory factors required by § 304(b)(2)(B) of the Act for developing effluent guidelines. 33 U.S.C. § 1314(b)(2)(B). These factors include the age of the equipment and facilities involved, the process employed, the engineering aspects of pollution control techniques, energy impacts and the cost of required effluent reductions but not the ability to pay that cost.

Prior to the decision below, any individual discharger could demonstrate factors "fundamentally different" from those EPA considered when developing industry-wide regulations, including pretreatment standards, and receive an "FDF variance" from those regulations. To apply for a FDF variance from an effluent guideline, a direct discharger would follow the procedures set forth in § 125.30 of the National Pollutant Discharge Elimination System ("NPDES") permit regulations. 40 CFR § 125.30 (1983). To apply for a FDF variance from a pretreatment standard, an indirect discharger would follow the procedures set forth in § 403.13 of the General Pretreatment Regulations. 40 CFR § 403.13 (1983).

The Third Circuit now has invalidated the use of FDF variances for toxic pollutants and remanded the pretreatment variance to the Agency. A-43. In compliance with the lower court decision, EPA has amended § 403.13 of the General Pretreatment Regulations to "make clear that the pretreatment FDF variance provision is not available for toxic pollutants." 49 *Fed. Reg.* 5131, 5132 (1984). Immediate review by this Court is required to

[1] Congress incorporated this consent decree by reference and thereby endorsed this approach to setting effluent guidelines and pretreatment standards in the 1977 Amendments to the Clean Water Act.

resolve the conflict this decision creates in the circuits and to remedy the harm caused by the remand.

I. THE ISSUES RAISED IN THIS CASE ARE CRITICAL TO THE DEVELOPMENT OF INDUSTRY-WIDE REGULATIONS UNDER THE CLEAN WATER ACT

A. FDF Variances Have Become an Established Agency Mechanism for Regulating Atypical Industrial Dischargers.

Section 301(*l*) of the CWA provides that "the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a) of this Act."[2] 33 U.S.C. 1311(*l*). In the decision below, the Third Circuit broadly interprets § 301(*l*) and holds that "FDF variances for toxic pollutant discharges are forbidden by the Act." A-43. This sweeping interpretation of § 301(*l*) extends beyond the scope of the General Pretreatment Regulations challenged below and calls into question the validity of FDF variances from effluent guidelines as well.

EPA develops all industry-wide regulations, including pretreatment standards, by combining categorical standards with the opportunity for individual dischargers within each category to apply for a FDF variance. The availability of FDF variances to fundamentally different individual dischargers is an integral part of developing industry-wide regulations and has become an established Agency practice in regulating both direct and indirect dischargers. The decision below to prohibit the use of FDF variances for toxic pollutants critically affects EPA's entire regulatory scheme under the Clean Water

[2] This list was developed by EPA and NRDC as part of the consent decree cited above. *See EDF v. Costle*, 636 F.2d 1229, 1234 (D.C. Cir. 1980).

Act and thereby is of vital concern to virtually all industrial dischargers, not just those subject to the pretreatment regulations challenged below.

For the purposes of developing industry-wide regulations, there is no radical difference between effluent guidelines and pretreatment standards. EPA develops effluent guidelines and pretreatment standards at the same time for twenty-one major industries,[5] covering sixty-five "priority" or toxic pollutants or groups of pollutants. Although the Act is silent on how pretreatment standards should be set, EPA regulates direct and indirect dischargers analogously, based on the same levels of control technology and according to the same technology-based criteria specified by statute for effluent guidelines and agreed to in the NRDC Consent Decree. *EDF* v. *Costle*, 636 F.2d at 1235.

FDF variances are available to both direct and indirect dischargers and thereby play an important role in the development of industry-wide regulations under the Clean Water Act. The availability of variances for facilities that are fundamentally different from those considered by EPA when developing an industry-wide regulation ensures that similar facilities will be subject to similar treatment. Fair and equitable treatment is essential, especially to individual facilities that EPA overlooked during the national rulemaking process.[6]

---

[5] The number of industrial categories for which EPA must promulgate BAT toxic standards has changed over the years as a result of a series of modifications to the NRDC Consent Decree. *See supra* text accompanying note 1. In January 1984, BAT standards for nine categories were yet to be promulgated. *NRDC* v. *Ruckelshaus*, 14 ELR 20185 (D.D.C. 1984).

[6] EPA continually acknowledges through regulation and in pleadings that it may overlook or fail to include factors relevant to a few plants, but not to the industry at large. 40 C.F.R. §§ 125.30, 403.13.

B. FDF Variances Remedy the Application of Ill-Suited Regulations to Unsampled Plants.

The role of FDF variances in setting effluent guidelines has been upheld by this Court in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), and hailed by lower federal courts as "an administrative safety valve" which "permits a more rigorous adherence to an effective regulation." *NRDC* v. *EPA*, 537 F.2d 642, 647 (2d Cir. 1976) (*quoting Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 399 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1979). The availability of FDF variances has helped to expedite EPA's enormously complex task of developing effluent guidelines and pretreatment standards for the 60,000 industrial dischargers regulated under the CWA.[7]

"The sheer number of point sources potentially subject to regulation and the rapidly approaching statutory deadlines required EPA to restrict itself in the regulation promulgation process to a representative sampling of plants." *NRDC*, 537 F.2d at 647. By coupling the promulgation of national standards with the opportunity to apply for a FDF variance, EPA can regulate these dischargers by industrial category rather than individually. Moreover, without a FDF variance provision, there is no guarantee that EPA could effectively remedy defects resulting from the application of "ill-suited" regulations to "unsampled individual plants." *Id.*

FDF variances also have helped both sets of industry-wide regulations survive legal challenges[8] and have been used as a bargaining device by the Agency to convince

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[7] The difficulty EPA has had with complying with its statutory mandate in a timely manner is well-documented. *See supra* text accompanying note 1. *See also CBE* v. *Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

[8] *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979). *See Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011 (1978).

industry not to challenge regulations.[7] Invalidating FDF variances at this stage of developing guidelines and standards is disruptive, confusing and likely to provoke recurring litigation over the ability of existing regulations to address the atypical plants not previously considered. Without a variance clause to address atypical situations, future regulations also may be the subject of protracted litigation. Quick resolution of this issue will avoid needless litigation expenses on the part of all parties and reduce litigation burdens on the lower courts.

II. THE THIRD CIRCUIT'S INTERPRETATION OF SECTION 301(*l*) OF THE CLEAN WATER ACT CREATES AN IRRECONCILABLE CONFLICT IN THE CIRCUITS AND UNDERMINES A PRIOR DECISION OF THIS COURT.

A. This Case Presents a Critical Question of Statutory Construction Which Affects All Requirements of § 301, Not Just Pretreatment Standards.

In ruling that section 301(*l*) prohibits FDF variances for toxic pollutants, the Third Circuit rejects the identical arguments presented by EPA and accepted by the Fourth Circuit in *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (1980). In both cases, EPA argued that § 301(*l*) was intended to apply only to specific sections of § 301, specifically § 301(e) and (g). 33 U.S.C. §§ 1311(e) and (g). *See CBE*, 718 F.2d at 1238 n.36. EPA also argued that a FDF variance does not relieve a discharger from complying with § 301. Rather, the FDF variance process subjects an individual discharger to a more appropriate § 301 standard by using data that was

[7] *See* 48 *Fed. Reg.* 46944, 46945-6 (1983) (Proposed regulations to implement settlement agreement resolving all legal challenges to effluent guidelines and pretreatment standards for the iron and steel point source category).

not available during the national rulemaking process. *Appalachian Power*, 620 F.2d at 1047.

In *Appalachian Power*, the Fourth Circuit squarely addressed the same issue and arguments presented below, but held that § 301(*l*) did not apply to FDF variances for toxic pollutants from BPT limitations. These two circuit court decisions cannot be reconciled. The Third Circuit itself expressly states that it "must disagree" with the Fourth Circuit's decision. A-43.

Both circuits frame the issue in general terms, without regard to levels of technology. The Fourth Circuit described the issue before it as whether § 301(*l*) "prohibits EPA from modifying *any of* § *301*. . . , including BPT limitations, *for toxic pollutants*." 620 F.2d at 1042 (emphasis added). Similarly, the Third Circuit states the issue below as whether "variances for toxic pollutants are forbidden by section 301(*l*) of the Act." A-40. Any contention that these decisions can be reconciled is without merit.

The fact that the FDF variance at issue in *Appalachian Power* was from a BPT effluent guideline does not reconcile this conflict in the circuits. The pretreatment standard at issue below and the BPT limitation at issue in *Appalachian Power* both apply to toxic pollutants on the § 307(a) list. 620 F.2d at 1047. Nor does § 301(*l*) distinguish between levels of technology.

Moreover, § 301(*l*) does not distinguish between effluent guidelines or pretreatment standards. Rather, § 301(*l*) expressly applies to "*any requirement* of [section 301]." (emphasis added). Pretreatment standards are just as much requirements of § 301 as are BPT and BAT effluent limitations. (A-41). See 33 U.S.C. §§ 1311(b)(1)(A), (b)(2)(A)(i) and (ii). *See also* H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 84, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4424, 4459.

This inconsistent treatment by two courts of appeals of the same issues and arguments presented by the same parties creates a clear conflict in the circuits which can be resolved only by this Court's review. Moreover, as previously noted, the Third Circuit has remanded the pretreatment FDF variance provision and ordered EPA to revise the General Pretreatment Regulations to conform with this disparate ruling. A-43. EPA so revised § 403.13(b)(2) on February 10, 1984. 49 *Fed. Reg.* (1984). Accordingly, this Court should grant the petitions for review.

B. There Is No Radical Difference Between Direct and Indirect Dischargers for the Purposes of Developing Industry-Wide Regulations.

The decision below also is contrary in principal to the decision of this Court in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). In *duPont*, this Court blessed EPA's regulatory scheme of allowing FDF variances from industry-wide effluent guidelines. This Court held that "the CWA authorizes the 1977 BPT limitations *as well as the [1984] BAT limitations* to be set by regulation, *so long as some allowance is made for variations in individual plants*, as EPA has done by including a variance clause in its 1977 limitations." 430 U.S. at 128 (emphasis added). Subsequent decisions have interpreted *duPont* as requiring FDF variances. *EPA* v. *National Crushed Stone Association*, 449 U.S. 64, 72 (1980); *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978).

In authorizing FDF variances from effluent guidelines, this Court in *duPont* stated that nothing in the CWA "suggests any radical difference in the mechanism use to impose limitations for [BPT] and [BAT]." 430 U.S. at 127. As demonstrated above, there also is no radical difference in the approach EPA uses to develop effluent guidelines and pretreatment standards.

FDF variances are as essential to the development of pretreatment standards as they are to effluent guidelines. Pretreatment standards, like effluent guidelines, are industry-wide regulations for which some allowances for individual variations must be made. The Chamber respectfully submits that the rationale in *duPont* should extend to pretreatment standards as well. Any time EPA sets industry-wide regulations, allowances also must be made for variations in individual plants, as EPA did by including FDF variances from industry-wide pretreatment regulations. The importance of administrative flexibility in ensuring fair and equitable treatment of *all* industrial dischargers weighs heavily in favor of this Court's granting review here.

CONCLUSION

The Third Circuit decision to prohibit FDF variances for toxic pollutants extends beyond the pretreatment regulations challenged below and has a profound effect upon all industries regulated under the Clean Water Act. By prohibiting the use of FDF variances for toxic pollutants from pretreatment standards, the Third Circuit creates an irreconcilable conflict in the circuits and eliminates any allowance for individual plants, as required by this Court in *duPont*.

By eliminating the "flexibility that *duPont* deemed crucial to the legality of *any set of industry-wide effluent limitation* under the Act," the Third Circuit decision calls into question the legality of existing regulations and the ability of future regulations to fully represent industry as a whole. *Weyerhaeuser*, 590 F.2d at 1033 (emphasis added). The Chamber of Commerce urges this Court to reconcile this conflict in the circuits so that further litigation may be avoided. Accordingly, we respectfully request this Court to grant the petitions for certiorari filed

by the Chemical Manufacturers Association and the Environmental Protection Agency.

Respectfully submitted,

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No. 83-1013

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent NRDC has filed a brief in opposition, arguing that the decision below does not create a conflict in the circuits, is not contrary to prior decisions of this Court, and is not sufficiently important to warrant this Court's attention. NRDC's arguments are puzzling and unpersuasive, and provide no valid grounds for denying *certiorari*. Moreover, it is now even more evident that the case involves a continuing question of major importance.

I. The Decision Below Creates A Conflict In the Circuits And Is Contrary To Decisions Of This Court.

According to respondent NRDC, the Third Circuit held that Section 301(l) of the Clean Water Act simply "prohibits variances from *pretreatment* standards for toxic pollutants," and since no other court has ruled on the pretreatment program, there is no conflict in the circuits. (NRDC Br. at 4). This

argument is disingenuous because NRDC has never claimed that § 301(1) is so limited.

In *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (4th Cir. 1980), NRDC argued (as it did below) that "§ 301(1) [of the Act] prohibits EPA from modifying *any* [requirement] of § 301 . . . including BPT limitations for toxic pollutants." (620 F.2d at 1042) (emphasis added). The Fourth Circuit flatly rejected NRDC's argument. (620 F.2d at 1047-48).

A few years later, undaunted by its loss in the Fourth Circuit, NRDC made the same argument in connection with EPA's pretreatment regulations. This time NRDC succeeded. The court below stated that "we must disagree" with the prior decision in *Appalachian Power*. (CMA Pet. Appx. A-43). The Third Circuit ruled that "Section 301(1) forbids modifications" and thus that "FDF variances for toxic pollutant discharges are forbidden by the Act." (*Id.*).

The conflict among the circuits could not be clearer. The fact that the Third and Fourth Circuits had different sets of regulations before them to review is not relevant to the conflict presented.[1] Indeed, it simply illustrates the recurring nature of the controversy.

NRDC also attempts to minimize the importance of this Court's decision in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). NRDC refuses to acknowledge the obvious tension between the decision below and this Court's ruling in *du Pont* that EPA may establish BPT effluent limitations by national regulation "so long as some allowance is made for variations in individual plants, as EPA has done by including a [FDF] variance clause" in its regulations. (*Id.* at 128).[2]

[1] Section 301(1) of the Act does not on its face address pretreatment standards; instead it applies to "any requirement of this section." Putting aside the issue of whether § 301(1) applies to FDF variances, it is quite clear that "the requirements of this section" include BPT and BAT as well as pretreatment regulations. 33 U.S.C. § 1311(b). (*See* NRDC Br. at 2).

[2] BPT and BAT effluent limits and pretreatment standards are established by EPA using a similar methodology, including the availability of FDF variances. (*See* EPA Pet. at 3-5). NRDC notes that in *du Pont* this Court struck down variances for new source standards, and argues that pretreatment standards should be treated the same way. (NRDC Br. at 6). NRDC's point fails to recognize that pretreatment standards, like BPT and BAT limitations, apply to existing plants, which can be retrofitted only with great difficulty. In contrast, new plants can be more readily designed to specifications. That is why Congress treated new sources separately.

NRDC also argues that Congress intended to impose "maximum feasible control" in pretreatment standards as with new sources, citing the legislative history of the 1977 amendments to the Act. (NRDC Br. n.12). However, the legislative history which NRDC cites in fact states that pretreatment standards should generally be at BAT (not new source) levels, taking into account differences between direct and indirect dischargers. (*A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 96th Cong., 2d Sess. 691 (1978)). The pretreatment standards involved in the case below were actually BPT-level standards. (*See* CMA Pet. Appx. at A-76).

NRDC argues that this Court in *du Pont* upheld certain BAT limits not containing an FDF variance clause (NRDC Br. at 6), but fails to note that BAT variances were not an issue in *du Pont*. Moreover, this Court in *du Pont* ruled that "nothing . . . in the Act . . . suggests any radical difference in the mechanism used to impose limitations for the 1977 [BPT] and 1983 [BAT] deadlines" (430 U.S. at 127), which suggests that FDF variances would be just as appropriate for BAT as for BPT.

The fundamental legal question presented is whether an FDF variance is a statutory modification prohibited by § 301(1) of the Act. In *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 77-78 (1980), this Court ruled that an FDF variance was not an "exemption" from the Act's technology-based requirements, but a mechanism for addressing effluent limitations which are "incomplete" and thus defective. (*See* CMA Pet. at 17-18). NRDC's brief does not dispute this important aspect of the Court's decision.

II. The Decision Below Involves Important And Recurring Questions.

CMA's petition showed that the decision below has upset a central feature of the technology-based guidelines and standards program. The implications of the decision below are sharpened by the petition filed subsequently by the United States

Environmental Protection Agency (No. 83-1373) and the brief *amicus curiae* filed by the Chamber of Commerce of the United States.

EPA's brief points out that the Agency has promulgated BAT-level pretreatment and direct discharge requirments for 26 industries within just the last two years, and is in the process of completing its regulations for the remaining industry categories. All of these regulations were developed based on typical plants, relying on the FDF variance clause to address atypical plants. If the decision below stands, the promulgation of EPA regulations would be subject to delay and possible legal challenge. (EPA Pet. at 11).

NRDC attempts to minimize the number of plants that will be affected by the Third Circuit's decision. (NRDC Br. at 7-8). NRDC overlooks three critical facts. First, some plants already subject to regulations may be expected to apply for variances in the future.[3] Second, CMA represents an industry that, for the most part, is not yet subject to nationally-applicable pretreatment, BPT or BAT standards promulgated by EPA. Plants in this industry have been subject to case-by-case limitations because EPA has not yet promulgated final regulations for the Organic Chemicals and Plastics and Synthetic Fibers industry, which by EPA's own estimates will cover between 1200 and 2100 facilities, including almost 500 plants that will be covered by pretreatment regulations.[4] Third, both sections 304 and 307 of the Clean Water Act, 33 U.S.C. §§ 1314 and 1317, require EPA periodically to review, and if appropriate to revise, BPT, BAT and pretreatment regulations. Thus, the conflicting decisions of the Third and Fourth Circuits will continue to have an impact in the future.

[3] Plants often do not become aware of the need for a variance until they have installed the necessary treatment system and it fails to achieve the expected discharge limits. This would ordinarily not occur until three years after promulgation of applicable EPA regulations. Thus, additional plants already subject to regulations may be expected to apply for variances in the future. While EPA's regulations may require variance applications to be filed sooner, EPA has not yet ruled on whether it will accept late applications, and no court has sustained that time-deadline requirement.

[4] 48 *Fed. Reg.* 11830 (Mar. 21, 1983). NRDC is incorrect when it asserts that BPT limits were an interim measure which, by the time of the Fourth Circuit's decision in *Appalachian Power* and Congressional consideration of 1977 amendments to the Clean Water Act, presented a problem that "will not recur." (NRDC Br. at 4). In fact, since the BPT limits for the organic chemicals industry have not yet been promulgated, plants in the organic chemicals industry will be able to obtain variances from BPT limits, but not from pretreatment standards, if the decision of the Third Circuit is allowed to stand.

The U.S. Chamber's brief underscores the significance of the issues presented to all American companies regulated by the Clean Water Act. At least 60,000 firms are potentially subject to national pretreatment standards, and an equal number of firms are potentially subject to BPT/BAT effluent guidelines. (*See* EPA Pet. at 11). It is therefore obvious that the decision below is of considerable importance.

CMA will not respond in detail to NRDC's arguments on the merits. As noted above, this Court in the *National Crushed Stone Ass'n* case has previously recognized the distinction between statutory modifications and FDF variances. The EPA petition and the U.S. Chamber brief also underscore the reasons why the Agency's construction of the Act should have been accepted.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States moves for leave to file the attached brief *amicus curiae* pursuant to Supreme Court Rule 36.3. Petitioners, Chemical Manufacturers Association ("CMA") and the Environmental Protection Agency ("EPA" or "Agency") have consented to the filing of this brief. Their consent letters have been filed with the Clerk of this Court. Efforts to obtain the

consent of counsel for the Respondents, Natural Resources Defense Council, Inc. ("NRDC"), were unsuccessful, thus necessitating this motion.

The Chamber of Commerce of the United States ("Chamber") is the largest association of business and professional organizations in the United States. Chamber membership exceeds 200,000 business firms and individuals, and includes over 195,000 corporations, partnerships and proprietorships and over 3,900 trade associations, and state and local chambers of commerce. The Chamber regularly represents the interests of its members in litigation of issues of national concern to the American business community and, in fact, filed an *amicus* brief in support of the Petition for Certiorari in this proceeding.[1]

The issue before the Court in this case is whether 301 (*l*) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311 (*l*), prohibits the Environmental Protection Agency ("EPA") from granting "fundamentally different factors" variances ("FDF variances") for toxic pollutants from national pretreatment standards. This issue involves a critical question of statutory construction which goes to the very heart of how EPA administers the Clean Water Act.

The Chamber believes the Third Circuit's decision to strike down the use of FDF variances for toxic pollutants is unduly broad and eliminates the flexibility this Court found so crucial to setting industry-wide regulations under the Clean Water Act in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) and *EPA* v. *National Crushed Stone Association*, 449 U.S. 53 (1980). Moreover, NRDC has indicated that it intends to challenge FDF variances from effluent guidelines on the same grounds as argued below in a lawsuit pending before the U.S. Court of Appeals for the District of Columbia Circuit. *NRDC* v. *EPA*, No. 80-1607. Thus, unless reversed by this Court, the Third Circuit decision will be used to undermine the way EPA develops *all* industry-wide regulations under the Clean Water Act, not just the pretreatment standards challenged below.

EPA develops effluent guidelines and pretreatment standards on an industry-wide basis by combining categorical standards with the opportunity for individual discharges within each category to demonstrate factors "fundamentally different" from those EPA considered when developing the industry-wide regulations. This practice benefits the Agency, the public and the regulated community. By focusing regulation development on typical facilities within a single industrial category and deferring consideration of atypical ones to subsequent individual proceedings, EPA saves time, reduces costs and ensures that similar facilities will be subject to similar treatment. Fair and equitable treatment in setting industry-wide regulations is important to all industrial dischargers, especially to those individual dischargers that EPA overlooked during the national rulemaking process.

The continued availability of FDF variances from effluent guidelines and pretreatment standards is of particular importance to the Chamber's member companies which represent a cross-section of the 60,000 individual firms subject to both sets of industry-wide regulations. These firms include coal companies, iron and steel manufacturers and petroleum refineries. Given the broad impact of the Third Circuit decision on American companies and the significance of this issue to the industrial com-

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[1] *See, e.g., CMA* v. *NRDC*, *cert. granted*, 52 U.S.L.W. 3791 (U.S. May 1, 1984) (No. 83-1013); *TWA* v. *Thurston*, *cert. granted*, 52 U.S.L.W. 3625 (U.S. Feb. 27, 1984) (No. 83-997); *Bowen* v. *U.S. Postal Service*, —— U.S. ——, 74 L. Ed. 2d 402 (1983).

munity as a whole, the Chamber respectfully seeks leave to file the attached brief.

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion For Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding.

INTRODUCTION

This case arises out of challenges to the Environmental Protection Agency's ("EPA" or "Agency") regulations governing the establishment of "fundamentally different factors" ("FDF") variances from national pretreatment standards under the Clean Water Act. 33 U.S.C. § 1251 (1978).[1] EPA promulgates pretreatment standards on an industry-wide basis under § 307(b) of the Clean Water Act, 33 U.S.C. 1317(b), to control the level of wastewater industrial facilities ("indirect dischargers") may discharge into a publicly-owned treatment plant.

EPA develops pretreatment standards according to specified statutory factors required by § 304(b) of the Act. 33 U.S.C. § 1314(b). These factors include the age of the equipment and facilities involved, the process employed, the engineering aspects of pollution control techniques, energy impacts and the costs of required effluent reductions but not the ability to pay that cost. Under the EPA regulations at issue in this case, any indirect discharger could demonstrate factors "fundamentally different" from these factors, and receive an FDF variance from the industry-wide standards. 40 CFR § 403.13 (1984).

In the proceeding below, the Natural Resources Defense Council, Inc. ("NRDC") challenged the pretreatment FDF variance regulation on two grounds: (1) that EPA has no authority to issue FDF variances; and (2) that § 301(*l*) of the Clean Water Act expressly prohibits FDF variances for toxic pollutants. Section 301

[1] The Chamber of Commerce of the United States does not wish to burden this Court with a detailed restatement of the facts or the proceedings below. Each has been well-stated by the Petitioners, Chemical Manufacturers Association. Accordingly, the Chamber respectfully refers this Court to their Statement of the Case.

(*l*) provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under Section 307(a)(1) of this Act." 33 U.S.C. § 1311(*l*).

The U.S. Court of Appeals for the Third Circuit did not rule on the question of EPA's inherent authority to issue FDF variances. Instead, it found the § 301(*l*) argument dispositive, and held that "FDF variances from toxic pollutants were forbidden by § 301(*l*) of the Act." (A-43). The Third Circuit remanded the pretreatment regulations to EPA which revised them "to make clear that the pretreatment FDF variance provision is not available for toxic pollutants." 49 *Fed. Reg.* 5131, 5132 (1984).

Prior to the decision below, FDF variances were available from both pretreatment standards and from their statutory counterparts, effluent guidelines,[2] without regard to levels of pollution control technology. EPA routinely included a FDF variance clause in each of the first-round, categorical "best practical control technology currently available" ("BPT") regulations which direct dischargers had to achieve by July 1, 1977. This FDF variance provision became part of the generic permit regulations on June 7, 1979. 40 C.F.R. § 125.30 (1983). It applied equally to the BPT and to the "best available technology economically achievable" ("BAT") regulations which direct dischargers must meet by July 1, 1984.

EPA added a similar FDF variance provision to the General Pretreatment Regulations on June 26, 1978.[3] 43 *Fed. Reg.* 27736-73. The pretreatment FDF variance,

[2] EPA promulgates effluent guidelines under § 301(b) of the Clean Water Act, 33 U.S.C. § 1311(b), to control the level of wastewater an industrial facility ("direct discharger") may discharge directly into the waters of the United States.

[3] Following further rulemaking, EPA revised these regulations on January 28, 1981. 46 *Fed. Reg.* 9404-60.

like its direct discharger counterpart, did not distinguish between levels of control technology until revised by EPA on February 10, 1984, in response to the decision of the Third Circuit below. Section 403.13 now provides that FDF variances are "not available for any toxic pollutant controlled in a categorical Pretreatment Standard." 49 *Fed. Reg.* 5132 (1984).

SUMMARY OF ARGUMENT

The Third Circuit held in the case below that § 301(*l*) of the Clean Water Act expressly prohibits FDF variances from industry-wide toxic pollutant standards. Accordingly, the court found it unnecessary to reach the issue of EPA's inherent authority to issue FDF variances in the first place.

That holding ignores two prior decisions of this Court, dismisses relevant legislative history and undermines a long-standing EPA practice for regulating atypical industrial dischargers which has been relied upon for years by EPA, the regulated community and the lower courts.

EPA's authority to issue FDF variances was established by this Court in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). In *duPont*, this Court held that EPA may establish BPT effluent limitations by industry-wide regulations "so long as some allowance is made for variances in individual plants." *Id.* at 128. This Court also stated that "nothing . . . . . in the Act . . . . . suggests any radical difference in the mechanism used to impose limitations for the 1977 [BPT] and 1983[4] [BAT] deadlines", thereby suggesting that FDF variances are as necessary for BAT as for BPT. *Id.* at 127. Nor did Congress, which was aware of this decision and of EPA's practice of allowing FDF variances, intend to overrule this Court's decision in *duPont* when it enacted § 301(*l*) in 1977. In fact, this Court reaffirmed the importance of FDF variances in setting industry-wide regulations in *EPA* v. *National Crushed Stone Association*, 449 U.S. 53 (1980), by describing FDF variances as a "necessary aspect" of regulating classes and categories of industrial point sources. *Id.* at 72.

Nevertheless, the Third Circuit below dismissed these clear indications of EPA authority to issue FDF variances from toxic pollutant standards, and broadly interpreted the scope of § 301(*l*) of the Act despite clear legislative history to the contrary. By holding that the Clean Water Act forbids FDF variances for toxic pollutants, the Third Circuit ignored explicit congressional intent to limit only EPA's authority to waive toxic pollutant standards under § 301(c) and (g) of the Act based on individual economic capabilities or water quality considerations but not on § 304(b) factors. 33 U.S.C. §§ 1311(c) and (g). Congress did not intend to limit EPA's authority to issue FDF variances because they do not relieve a discharger from complying with a statutory standard, but rather subject it to a more complete standard.

The Third Circuit's sweeping misinterpretation of § 301(*l*) goes to the very heart of how EPA develops industry-wide regulations for *all* industrial dischargers, not just those subject to pretreatment standards. The Third Circuit decision not only invalidates the use of FDF variances from pretreatment standards, but also jeopardizes the use of FDF variances generally. The decision below threatens EPA's entire regulatory scheme and, unless reversed by this Court, will eliminate the flexibility this Court found so crucial to setting industry-wide regulations under the Clean Water Act.

ARGUMENT

I. THE DECISION BELOW UNDERMINES A LONG-STANDING EPA PRACTICE FOR REGULATING ATYPICAL INDUSTRIAL DISCHARGERS UNDER THE CLEAN WATER ACT.

Section 301(*l*) of the Clean Water Act provides that the Administrator may not modify the requirements of § 301 for toxic pollutants. 33 U.S.C. § 1301(*l*). In the decision below, the Third Circuit broadly interpreted § 301(*l*) and held that "FDF variances for toxic pollutant discharges are forbidden by the Act." (A-43).

The Third Circuit's broad interpretation of § 301(*l*) undermines a long-standing EPA practice for regulating all industrial dischargers under the Clean Water Act. NRDC has notified the U.S. Court of Appeals for D.C. Circuit that it intends to challenge the FDF variance provision for direct dischargers on the same grounds raised in the Third Circuit for pretreatment. Unless reversed by this Court, the Third Circuit's sweeping interpretation of § 301(*l*) will be used to eviscerate EPA's reasonable construction of the statutory scheme it is entrusted to administer. *See Chevron U.S.A.* v. *NRDC*, No. 82-1005 (June 25, 1984).

EPA develops all industry-wide regulations, including pretreatment standards, by combining categorical standards with the opportunity for individual dischargers within each category to apply for a FDF variance. The availability of FDF variances to fundamentally different dischargers is an integral part of developing industry-wide regulations and has become an established Agency practice for regulating both direct and indirect dischargers. In fact, this Court has upheld the role of FDF variances in setting effluent guidelines on two separate occasions. *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) and *EPA* v. *National Crushed Stone Association*, 449 U.S. 53 (1980). Lower federal courts have hailed

the FDF variance as "an administrative safety valve" which "permits a more rigorous adherence to an effective regulation." *NRDC* v. *EPA*, 537 F.2d 642, 647 (2d Cir. 1976) (*quoting Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 399 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1979)).

FDF variances are available to both direct and indirect dischargers and therefore are of vital concern to virtually all industrial dischargers, not just those subject to the pretreatment regulations challenged below. The FDF variance process allows EPA to focus its rulemaking efforts on more typical plants in an industrial category. Deferring consideration of atypical plants to a subsequent individual FDF variance proceeding ensures that similar facilities will be treated similarly. It also avoids challenges to an entire set of industry regulations on the grounds that they are not fully representative of industry as a whole.

The FDF variance process also helps EPA expedite its enormously complex task of developing effluent guidelines and pretreatment standards for the 60,000 industrial dischargers regulated under the Clean Water Act. "The sheer number of point sources potentially subject to regulation and the rapidly approaching statutory deadlines required EPA to restrict itself in the regulation promulgation process to a representative sampling of plants." *NRDC*, 537 F.2d at 647.

By coupling the promulgation of national standards with the opportunity to apply for a FDF variance, EPA can regulate dischargers by industrial category rather than individually. Moreover, without a FDF variance provision, there is no guarantee that EPA could effectively remedy defects resulting from the application of "ill-suited" regulations to "unsampled individual plants." *Id.*

FDF variances also helps both sets of industry-wide regulations survive legal challenges[4] and have been used as a bargaining device by the Agency to convince industry not to challenge regulations.[5] Without a variance clause to address atypical situations, future industry-wide regulations also may be the subject of protracted litigation. The Chamber therefore urges this Court to reverse the Third Circuit decision to prohibit FDF variances for toxic pollutants so that EPA's long-standing approach for regulating industrial discharges under the Clean Water Act may continue without the constant threat of impending litigation.

II. THE DECISION BELOW IGNORES TWO PRIOR DECISIONS OF THIS COURT WHICH REQUIRE FDF VARIANCES WHEN SETTING INDUSTRY-WIDE REGULATIONS UNDER THE CLEAN WATER ACT.

The Third Circuit decision to strike down the use of FDF variances for toxic pollutants is inconsistent with this Court's prior interpretations of the Clean Water Act. In *duPont*, this Court approved of EPA's regulatory scheme of allowing FDF variances from industry-wide regulations. At issue was whether EPA could set effluent limitations by regulations for industry categories even though the statute authorized BPT limits for individual point sources and BAT limits for classes and categories of point sources. This Court held that "the CWA authorizes the 1977 BPT limitations *as well as the* [1984] *BAT limitations* to be set by regulations, *so long as some allowance is made for variations in individual*

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[4] *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979). *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (1978).

[5] *See* 48 *Fed. Reg.* 46945-6 (1983) (Proposed regulations to implement settlement agreement resolving all legal challenges to effluent guidelines and pretreatment standards for the iron and steel point source category).

plants, as EPA has done by including a variance clause in its 1977 limitations." *duPont* at 128 (emphasis added). Subsequent decisions have interpreted *duPont* as *requiring* FDF variances. *Weyerhaeuser*, 590 F.2d at 1032 ("recently the Supreme Court held that . . . a variance provision is legally required . . ."); *NRDC*, 537 F.2d at 647 (1976) ("without variance flexibility, the program might well founder on the rocks of illegality").

In *National Crushed Stone Ass'n*, this Court reaffirmed the importance of FDF variances to the development of industry-wide regulations under the Clean Water Act. There the Court described FDF variances as a "necessary aspect" of applying effluent limitations by regulations to classes and categories of point sources. *Id.* at 72. The Court also noted that industry-wide regulations would be defective without FDF variances:

> If a point source can show that its situation . . . is not within the range of circumstances considered by the Administrator, then it may receive a variance. . . . In such situations, the variance is an acknowledgment that the uniform BPT limitation was set without references to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete.

Id. at 77-78.

Although the FDF variances referred to in both *duPont* and *National Crushed Stone Ass'n* were from BPT effluent limitations, *duPont* makes clear that nothing in the CWA "suggests any radical difference in the mechanism used to impose limitations for [BPT] and [BAT]." *Id.* at 127. Moreover, the BPT standards at issue in *duPont* contained a FDF variance clause and regulated toxic pollutants.

Nor is there any radical difference in the approach EPA uses to develop effluent limitations and pretreatment standards. EPA develops pretreatment standards at the same time as effluent guidelines, according to the same factors required by statute for developing effluent guidelines, and at levels of technology equivalent to BPT and BAT. This approach for implementing the pretreatment program was agreed to by NRDC in the consent decree with EPA which Congress later endorsed by incorporating it by reference in the 1977 Amendments to the Clean Water Act.[6] This approach has been followed by EPA and relied upon by the regulated community since 1977. *EDF* v. *Costle*, 636 F.2d 1229, 1235 (D.C. Cir. 1980).

FDF variances from pretreatment standards serve the same function as FDF variances from effluent guidelines, and are as essential to the development of industry-wide pretreatment standards as they are to effluent guidelines. The Chamber respectfully submits that the rationale of *duPont* and *National Crushed Stone Ass'n* should therefore extend to pretreatment standards as well. Anytime EPA sets industry-wide regulations, allowances also must be made for variations in individual plants, as EPA did by including FDF variances from industry-wide pretreatment regulations.

III. THE DECISION BELOW DISMISSES RELEVANT LEGISLATIVE HISTORY AND IGNORES CONGRESSIONAL INTENT TO LIMIT THE APPLICABILITY OF SECTION 301(*l*) OF THE CLEAN WATER ACT.

Section 301(*l*) of the CWA provides that "the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on

[6] *NRDC* v. *Train*, 8 E.R.C. 2120 (D.D.C. 1976), *modified sub nom. NRDC* v. *Costle*, 12 E.R.C. 1833 (D.D.C. 1979), *modified sub nom. NRDC* v. *Gorsuch* (D.D.C. Oct. 26, 1982) (hereinafter referred to as the "NRDC Consent Decree.")

the toxic pollutant list under section 307(a)(1) of this Act."[7] In the decision below, the Third Circuit broadly interpreted § 301(*l*) to prohibit both FDF variances from toxic pollutants and waivers of BAT and pretreatment obligations authorized by §§ 301(c) and (g) of the Act. 33 U.S.C. § 1311(c) and (g).

The Chamber believes that this interpretation of § 301(*l*) is inconsistent with the legislative history of the Clean Water Act which demonstrates congressional intent to limit the scope of § 301(*l*) to statutory modifications under §§ 301(c) and (g) of the Act. Consequently, we urge this Court to adopt the interpretation of § 301(*l*) presented by EPA here and upheld by the Fourth Circuit in *Appalachian Power Company* v. *Train*, 620 F.2d 1040 (1980).

In *Appalachian Power*, the Fourth Circuit squarely addressed the same issue and arguments presented below,[8] but held that § 301(*l*) did not apply to FDF variances for toxic pollutants from BPT limitations. The Fourth Circuit accepted EPA's arguments that § 301(*l*) applies only to §§ 301(c) and (g), and that a FDF variance does not relieve a discharger from complying with § 301, but rather subjects it to a more complete § 301 standard by using data that was not available during the national rulemaking process.[9] *Id.* at 1047.

[7] This list was developed by EPA and NRDC as part of the consent decree cited above.

[8] Both the Third and Fourth Circuits frame the issue in general terms, without regard to levels of technology. The Fourth Circuit described the issue before it as whether § 301(*l*) "prohibits EPA from modifying any of § 301(*l*) . . . . including BPT limitations, for *toxic pollutants*." 620 F.2d at 1047 (emphasis added). Similarly, the Third Circuit states the issue below as whether "variances for toxic pollutants are forbidden by Section 301(*l*) of the Act." (A-40).

[9] That, in fact, is exactly how this Court described FDF variances in *National Crushed Stone*. See text accompanying p. 9 above.

The Fourth Circuit based its holding on the structure of the Clean Water Act, its legislative history, and the general principle of deferring to an agency's construction of the statute it administers. *Id.* at 1048. Observing that "the best that can be said for § 301(*l*) is that it is not clear," the Fourth Circuit "(gave) weight to the construction of the administering agency" and held that § 301(*l*) does not prohibit FDF variances for toxic pollutant standards. *Id.* at 1048. *Accord, Chevron U.S.A.* v. *NRDC*, No. 82-1005 (June 25, 1984). The Chamber urges this Court to adopt the Fourth Circuit's rationale here.

In the decision below, the Third Circuit not only "disagrees" with the Fourth Circuit's interpretation of § 301 (*l*), but it also dismisses explicit legislative history which demonstrates Congress' primary concern for prohibiting modifications under § 301(c) and (g). (A-42). In so doing, the Third Circuit cavalierly ignores clear congressional intent.

The legislative history of § 301(*l*) should not be dismissed so lightly. Congress was aware of this Court's decision in *duPont* and of EPA's practice of allowing FDF variances when it adopted § 301(*l*). If Congress sought to overrule *duPont* it would have done so explicitly. Instead, Congressman Roberts, House leader of the 1977 CWA amendments, described the objective of § 301(*l*) as follows:

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modifications of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. 328-29 (1978).

The legislative history of the Clean Water Act does not support the Third Circuit's assumption that Congress intended to override or expressly limit FDF variances for toxic pollutant standards when it enacted § 301(*l*) of the Act. On the contrary, the legislative history demonstrates congressional approval of both the FDF variance process and EPA's interpretation that § 301(*l*) of the Act does *not* prohibit FDF variances for toxic pollutant standards.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce respectfully urges this Court to reverse the decision below and to reaffirm EPA's inherent authority to issue FDF variances for toxic pollutant standards as previously established by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION,
AMERICAN CYANAMID COMPANY,
FMC CORPORATION, AND
UNION CARBIDE CORPORATION,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the decision of the court of appeals is contrary to this Court's holding in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 128 (1977) that effluent limitations may be "set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause" in its regulations.

2. Whether the court below was incorrect in ruling that § 301(l) of the Clean Water Act precludes the granting of a variance for toxic pollutants to atypical plants that can demonstrate a factor not considered by EPA in establishing national technology-based regulations.

3. Whether the decision below, by removing EPA's discretion to deal with atypical situations either by individual orders or by rulemaking, is contrary to this Court's decision in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

PARTIES

The parties to this action are as follows:[1]

Chemical Manufacturers Association, American Cyanamid Company, FMC Corporation, Union Carbide Corporation;

Natural Resources Defense Council, Inc.; and

U.S. Environmental Protection Agency.

The Natural Resources Defense Council, Inc. ("NRDC") was the petitioner below. The U.S. Environmental Protection Agency ("EPA") was the respondent. The Chemical Manufacturers Association, *et al.*, were intervenor-respondents below.[2]

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, the parent companies, subsidiaries and affiliates of each corporate party to the brief are set forth in the Appendix to the Petition for a Writ of Certiorari ("Pet. Appx.") at A-111.

[2] The above list includes all parties to the separately-briefed case numbers 81-1977 and 81-1985 below. The decision below also ruled on petitions filed by other parties which did not involve the questions presented here. The parties to these other cases below are set forth in the Petition for a Writ of Certiorari at ii.

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BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit in *National Association of Metal Finishers* v. *EPA* is reported at 719 F.2d 624 and is reprinted at page A-1 of the Appendix to the Petition for a Writ of Certiorari ("Pet. Appx.").

JURISDICTION

The order of the court of appeals was entered on September 20, 1983. The Petition for a Writ of Certiorari was filed on December 19, 1983, and granted on April 30,

1984, together with the petition in No. 83-1373. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(l) (1982).

STATUTES AND REGULATIONS INVOLVED

This case involves technology-based "pretreatment standards" under § 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b) (1982). Section 301(b) of the Act, 33 U.S.C. § 1311(b) (1982), describes various effluent limitations and standards that dischargers of pollutants are to achieve. The factors that the Administrator must consider in establishing effluent limitations and standards are set forth in § 304(b) of the Act, 33 U.S.C. § 1314(b) (1982). Sections 301(c) and (g) of the Act, 33 U.S.C. § 1311(c) and (g) (1982), authorize modifications of certain of the § 301 limitations and standards. Section 301(l) of the Act, 33 U.S.C. § 1311(l) (1982), provides that the Administrator may not modify the requirements of § 301 for toxic pollutants. Sections 301(b), 301(l), 304(b) and 307(b) of the Act are set forth in Pet. Appx. at A-116-21. Sections 301(c) and (g) are set forth in the Appendix to this brief at 1a.

The EPA regulation at issue in this case governing the establishment of "fundamentally different factors" ("FDF") variances is codified at 40 C.F.R. § 403.13 (1983), and is set forth in Pet. Appx. at A-122.

STATEMENT OF THE CASE

The Clean Water Act requires EPA to promulgate effluent limitations guidelines and standards, based on the use of available technology, governing the discharge of pollutants by American industry. The statute also specifies the factors, such as cost and technical feasibility, that EPA must take into account in promulgating such limitations and standards. To carry out its task, EPA has

divided industry into major categories, collected data on an industry-by-industry basis, and promulgated guidelines and standards for each industry category. Within a single industry category, however, there may be hundreds, or even thousands, of dischargers. Thus, developing limitations and standards for even a single industry category is a challenging task.

As a matter of necessity, EPA has focused its efforts in promulgating such limitations and standards on the more typical plants in an industry. EPA has left to subsequent individual proceedings the development of limitations and standards, based on the statutory factors, for atypical or "fundamentally different" plants not previously considered. This long-standing EPA practice has resulted in significant cost and time savings in the development of industry guidelines and standards and has helped insulate such guidelines and standards from challenges by atypical plants.

The judgment of the Third Circuit struck down EPA's procedure for considering fundamentally different dischargers of toxic pollutants subject to pretreatment standards. This case thus involves the important issue of EPA's authority to apply the statutory factors to establish pretreatment standards for fundamentally different plants in individual proceedings.

Legislative Background

The Clean Water Act established technology-based treatment requirements for all dischargers to waters of the United States. These requirements are applicable to plants that discharge water directly to waters of the United States ("direct dischargers") and plants that discharge to municipal sewer systems ("indirect dis-

chargers").[1] While direct and indirect dischargers are covered by separate programs and separate provisions of the Act, EPA has established comparable treatment requirements for these two groups of dischargers.

For direct dischargers, the Clean Water Act established a two-phase technology-based program. Section 301(b)(1)(A) of the Act, 33 U.S.C. § 1311(b)(1)(A) (1982), required "point source" direct dischargers to achieve by July 1, 1977, effluent limitations based on the application of the "best practicable control technology currently available" ("BPT"). By July 1, 1984, or in some cases July 1, 1987, the Act requires "classes and categories" of direct dischargers to achieve effluent limitations based upon the "best available technology economically achievable" ("BAT"). 33 U.S.C. § 1311(b)(2)(A) (1982). These BPT and BAT limitations, which are incorporated in permits issued to direct dischargers, are to be based upon effluent limitations guidelines promulgated by EPA pursuant to § 304(b), 33 U.S.C. § 1314(b). Indirect dischargers to municipal sewer systems (or publicly-owned treatment works ("POTWs")) are required to comply with pretreatment standards promulgated by EPA under § 307(b) of the Act, 33 U.S.C. § 1317(b), for pollutants that are not susceptible to treatment by POTWs or would interfere with the operation of POTWs.[2] Relying upon legislative history that suggests that pretreatment standards are to

[1] In the case of indirect dischargers, the wastewater is generally treated first by the industrial discharger as required by federal, state and local requirements. Then the wastes of industrial dischargers are combined with municipal and domestic wastes and are treated at a publicly-owned treatment works before being discharged to United States waters.

[2] While § 307(b)(3) directs EPA to designate the "category or categories" of sources to which particular standards will apply, it does not specify all of the criteria for developing pretreatment standards.

be comparable to limitations for direct dischargers, EPA has established technology-based pretreatment standards comparable to BPT and BAT limitations.[3]

Congress intended these effluent limitations and standards to be as uniform as possible across industry categories. But Congress also intended for EPA to take account of the similarities and differences that exist among plants within an industry category and among industry categories. Only similar plants were to be subject to similar effluent limitations and standards.[4]

Congress also provided for certain case-by-case waivers of applicable BAT and pretreatment requirements. Thus, not even all similar plants were to be subject to uniform treatment requirements. In particular, §§ 301(c) and (g) of the Act, 33 U.S.C. §§ 1311(c) and (g), allow the Administrator to modify applicable BAT limitations and pretreatment standards in prescribed circumstances relating to economic and water quality impacts.[5] Pur-

[3] H.R. Rep. No. 830, 95th Cong., 1st Sess. 87 (1977). *See* discussion at 17-18, *infra*.

[4] As Congress stated in 1972:

> Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be *precise in his guidelines* under subsection (b) of this section, *so as to assure that similar point sources with similar characteristics*, regardless of their location or the nature of the water into which the discharge is made, *will meet similar effluent limitations*.

S. Rep. No. 1236, 92d Cong., 2d Sess. 126 (1972) (emphasis added).

[5] Under § 301(c), a discharger may be relieved of its obligation to meet BAT effluent limitations or pretreatment standards if the Administrator finds that less stringent limitations or standards "will represent the maximum use of technology within the economic capability" of the discharger and "will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C.

suant to § 301(l), which was originally introduced as part of §§ 301(c) and (g),[6] the Administrator may not modify requirements of § 301 of the Act for toxic pollutants. 33 U.S.C. § 1311(l). As discussed below, the § 301(c) and (g) waivers are quite different in nature from the FDF variances involved here.

Administrative Background

EPA has developed BPT, BAT and pretreatment requirements through a series of extensive rulemaking proceedings covering 21 major industry categories and 65 toxic pollutants or groups of pollutants. These effluent limitations and standards are developed simultaneously, with the pretreatment standards generally being set at levels equal to the BPT and BAT limitations for direct dischargers.[7]

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§ 1311(c). Such economic waivers are not available from BPT limitations. Section 301(g), 33 U.S.C. § 1311(g), requires the Administrator, with the concurrence of the state, to relieve a discharger from the obligation to meet BAT limitations or pretreatment standards for nonconventional pollutants where the discharger demonstrates, *inter alia*, that the waiver of its obligations will not interfere with water quality.

[6] See discussion at 28-30, *infra*.

[7] This strategy was the basis for settling suits by four environmental groups, and the resulting settlement agreement was approved in 1976. NRDC v. Train, 8 E.R.C. 2120 (D.D.C. 1976), *modified sub nom.* NRDC v. Costle, 12 E.R.C. 1833 (D.D.C. 1979), *modified sub nom.* NRDC v. Gorsuch (D.D.C. Oct. 26, 1982), *modified sub nom.* NRDC v. Ruckelshaus, Nos. 2153-73 *et al.* (D.D.C., Aug. 2, 1983 and Jan. 6, 1984) (hereinafter referred to as the "NRDC Consent Decree"). In the 1977 amendments to the Clean Water Act, Congress sanctioned the Agency's approach to establishing effluent limitations and standards. *See* EDF v. Costle, 636 F.2d 1229, 1244 (D.C. Cir. 1980).

In developing these limitations and standards, EPA is required by the statute to consider certain factors. In particular, § 304(b) requires EPA to take into account the age of the equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impacts (including energy impacts) and the costs of control.[8] In order adequately to consider these factors, EPA engages in an extensive data-collection effort, compiling information on the pollutants discharged by an industry, the processes employed, the treatment technologies used by the industry or available for use, the treatability of the pollutants, and the economics of the industry. Usually, the data indicate differences among segments of the industry and EPA will establish subcategories within the industry to reflect those differences in the effluent limitations and standards that are promulgated.

EPA recognized at an early stage in the development of guidelines and standards that it would not always be possible during the rulemaking proceeding on the nationally-applicable requirements to gather and take into account data relating to each statutory factor for

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The Act also authorizes EPA to establish new source standards for new dischargers. 33 U.S.C. § 1316 (1982). Congress established a separate program for new sources because it believed that new sources could be constructed to meet more stringent requirements than could be applied to existing plants, which would have to retrofit their facilities to meet treatment requirements. FMC Corp. v. Train, 539 F.2d 973, 981 n.13 (4th Cir. 1976). EPA is also establishing new source pretreatment standards for new indirect dischargers. Variances to new source standards and new source pretreatment standards are not allowed by EPA and are not an issue in this case.

[8] In establishing BPT limitations, EPA must balance these costs against effluent reduction benefits.

every discharger in an industry category. Thus the Agency recognized that, if the § 304 statutory factors are to be considered in the establishment of limitations and standards applicable to a plant, it must develop a procedure whereby those factors may be considered in an individual proceeding for those relatively few plants that can demonstrate that they are fundamentally different from the typical plants EPA considered in developing the regulations applicable to an industry category. The mechanism that EPA developed to apply the statutory factors to these atypical plants was the "fundamentally different factors" ("FDF") variance proceeding. The FDF variance regulation for direct dischargers is codified at 40 C.F.R. § 125.31 (1983); the regulation applicable to indirect dischargers is found in 40 C.F.R. § 403.13 (1983).[9]

The term "variance" is a misnomer. It is not an exemption from the technology-based requirements of the Act. A plant which receives an FDF variance must achieve BPT, BAT or pretreatment, as the case may be. The FDF procedure is more accurately characterized as an individualized determination of the appropriate BPT, BAT or pretreatment standards, applying the § 304 factors, for those "fundamentally different" plants whose operations are not adequately covered by EPA's industry-wide regulations.

EPA's "variance" regulation provides that any interested person may apply to EPA for an FDF variance

[9] A copy of 40 C.F.R. § 403.13 appears in Pet. Appx. at A-122. Although this case technically involves only the FDF variance for indirect dischargers, the same issues arise with respect to the variance regulation for direct dischargers. NRDC has indicated that it intends to raise these issues in an ongoing proceeding in the United States Court of Appeals for the District of Columbia Circuit. NRDC v. EPA, D.C. Cir. Nos. 80-1607, *et al.*

for a plant that is believed to be "fundamentally different" from the plants EPA considered in developing industry-wide requirements. The variance may result in discharge limits that are either more or less stringent than the limits for the industry category.[10] A plant that receives a variance from a pretreatment standard is *not exempted* from the standard, but will be given an individual standard determined by applying the § 304 factors to the plant. In order for a discharger to obtain an FDF variance, it must satisfy two key requirements. It must first show that it is fundamentally different from the other plants in the industry in ways corresponding to the § 304 factors.[11] The discharger must then demonstrate that compliance with the industry standards would result in either a pollutant removal cost wholly out of proportion to the cost considered by EPA in developing the standards, or a non-water quality environmental impact fundamentally more adverse than the impact that EPA considered in developing the standards.[12]

The FDF variance mechanism has to date been used sparingly. Nonetheless, the FDF variance has proved to

[10] A member of the public may apply to EPA for a variance seeking the application of different, more stringent limits to a fundamentally different plant, or the plant may apply for a variance seeking different, less stringent limits. A variance request may also be initiated by EPA.

[11] These factors are: the nature or quality of pollutants, the volume of the discharger's process wastewater, the non-water quality environmental impact of control and treatment, the energy requirements of treatment technology, the age, size, land availability and configuration as they relate to the discharger's equipment or facilities, processes employed, process changes, engineering aspects of the application of the control technology, and the cost of compliance with required control technology. 40 C.F.R. § 403.13(d) (1983).

[12] 40 C.F.R. §§ 403.13(c)(2)(iv) and (c)(3)(ii) (1983).

be essential in certain cases. An example well illustrates this point.

Freeport Chemical Company operates a phosphoric acid manufacturing plant in Uncle Sam, Louisiana. On June 3, 1981, EPA granted Freeport an FDF variance from the BPT effluent limitations for flouride, total phosphorous, and total suspended solids.[13] The Agency found that the Freeport plant design differed from the typical phosphoric acid manufacturing plant because it used a "once-through" cooling water system in which river water was pumped through the plant for cooling purposes, treated, and discharged. The plants EPA had examined in developing its regulations for the industry used recycling systems, and the Agency's BPT regulation thus allowed for no discharge. Freeport determined that compliance with such limitations would require it to retrofit its plant at a cost of $27 million, with annual operating costs of $13 million. By contrast, EPA had estimated that plants with recycling systems would have to spend, on average, only $500,000, with an annual operating cost of $40,000, in order to comply with the regulations.

Freeport's predicament dramatically illustrates the need for an FDF variance procedure. In formulating regulations for a diverse industry category, EPA cannot possibly take into account every important difference that exists among the many plant designs and processing techniques. Inevitably, there will be an atypical plant or process that does not fit neatly into the subcategories EPA has established. In order to deal with these in-

[13] In the Matter of Freeport Chemical Company, Final Decision of the Administrator Concerning the Request of Region VI, U.S. Environmental Protection Agency, for Approval of Alternative Effluent Limitations for Freeport Chemical Company, Uncle Sam, LA., Pursuant to 40 C.F.R. § 418.12, FDF 78-01 (June 3, 1981).

stances fairly and efficiently, EPA must have available a mechanism that will allow it to formulate requirements that apply the § 304 factors to such atypical plants.

EPA has relied upon the FDF variance in virtually every effluent limitation and standard regulation under §§ 301(b), 304(b) and 307(b) of the Act. It has enabled EPA to focus on typical facilities in the development of industry-wide regulations, with the knowledge that an atypical plant can receive individualized limitations and will not be able to convince a court to overturn an entire set of industry regulations on the sole ground that the regulations are unlawful as applied to it. Thus the FDF variance procedure is an essential, limited "safety valve" in EPA's effluent limitations and standards program.

Judicial Decisions

The FDF variance procedure has been approved, and indeed held to be required, by several courts of appeals and by this Court. We will discuss these prior decisions briefly before turning to the contrary decision below.

The Natural Resources Defense Council, Inc. ("NRDC") first challenged the FDF variance in the United States Court of Appeals for the Second Circuit. *NRDC* v. *EPA*, 537 F.2d 642 (2d Cir. 1976). NRDC argued that the variance provision violated the congressionally mandated goal of national uniformity and the intent of Congress that subcategories of industry be the only means for dealing with variations among dischargers. 537 F.2d at 644, 646. EPA responded, and the court of appeals agreed, that Congress intended uniform treatment only for similar plants and, in formulating regulations that will apply to thousands of plants, EPA will undoubtedly overlook distinguishing characteristics

of individual plants. 537 F.2d at 646. The court of appeals noted:

> It is entirely possible that the . . . regulations will prove ill-suited to some of the unsampled individual plants to which they will be applied in the permit process. Unless the variance clause is established, there is no guarantee that such a defect could be effectively remedied if it occurred.
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> * * *
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> *Without variance flexibility, the program might well founder on the rocks of illegality.* 537 F.2d at 647 (emphasis added).

The court thus held that the FDF variance regulation was a valid exercise of EPA's authority under § 501(a) of the Clean Water Act to promulgate regulations that are necessary and proper to implement the Act. *Id.*

This Court subsequently approved—and indeed required—the FDF variance in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) ("*du Pont*"), a case in which NRDC was also involved as *amicus curiae*. The major issue in *du Pont* was whether EPA was authorized to promulgate regulations establishing single number effluent limitations for categories of industry, or whether EPA could promulgate only effluent limitations guidelines establishing ranges of limitations to be applied to individual plants on a case-by-case basis in permit proceedings.[14] This Court concluded that EPA had the authority to establish BPT and BAT limitations by regulation "*so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations.*" 430 U.S. at 128 (emphasis added).

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[14] See discussion at 18-20, *infra*.

This Court further elaborated upon the importance of FDF variances in *EPA* v. *National Crushed Stone Association*, 449 U.S. 64 (1980) ("*National Crushed Stone Association*"). There the Court noted that effluent limitations adopted without reference to the statutory factors for a particular atypical discharger were incomplete and that the variance mechanism was an acknowledgment that the regulations would otherwise be defective:

> If a point source can show that its situation . . . is not within the range of circumstances considered by the Administrator, then it may receive a variance. . . . In such situations, the variance is an acknowledgment that the uniform BPT limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete. *Id.* at 77-78.

NRDC next challenged EPA's FDF variance provision in *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (4th Cir. 1980). In *Appalachian Power*, NRDC argued that Congress' enactment in 1977 of § 301(l), which prohibits modifications of § 301 requirements for toxic pollutants, barred FDF variances for toxic pollutants. EPA responded, and the court of appeals agreed, that an FDF variance is not a modification of applicable limitations but is instead an individual determination of the appropriate limitations. EPA argued that § 301(l) of the Act was intended to apply only to the § 301 modifications, namely the economic waiver in § 301(c) and the water quality waiver in § 301(g). The court upheld EPA's interpretation of § 301(l).

Undaunted, NRDC again challenged the FDF variance in the proceeding below in the United States Court of

Appeals for the Third Circuit. The suit concerned EPA's general pretreatment regulations, codified at 40 C.F.R. Part 403, and in particular the FDF variance regulation in 40 C.F.R. § 403.13 (1983).[15] NRDC argued that the FDF variance was unlawful on two grounds. First, NRDC argued that FDF variances were generally unlawful because they were not authorized by the Clean Water Act. Recognizing that this Court in *du Pont* construed the Clean Water Act to require FDF variances, NRDC argued that the *du Pont* decision was limited to BPT variances and did not apply to variances from BAT or pretreatment standards. NRDC's second argument was that § 301(l) of the Act prohibited FDF variances for toxic pollutants. Relying upon this Court's *du Pont* decision and other cases, EPA responded that FDF variances are necessary, if not required, to apply the statutory factors to atypical plants not considered by the Agency in its rulemaking proceeding to establish requirements for an industry category. EPA also argued, as it had in *Appalachian Power* v. *Train*, *supra*, 620 F.2d at 1046-47, that § 301(l) applied only to modifications of applicable requirements authorized by §§ 301(c) and (g) of the Act, and not to FDF variances.

The Third Circuit did not address NRDC's broader argument that FDF variances are unlawful under the Clean Water Act. The court did hold, however, that § 301(l) prohibited FDF variances for toxic pollutants, rejecting the distinction EPA made between FDF variances and §§ 301(c) and (g) modifications. The court also rejected EPA's argument that the principle of this

[15] EPA first promulgated the general pretreatment regulations on June 26, 1978 (43 *Fed. Reg.* 27736-773). Following further rulemaking, revised general pretreatment regulations were promulgated on January 28, 1981 (46 *Fed. Reg.* 9404-60).

Court's decision in *du Pont* authorizes EPA to allow FDF variances from pretreatment standards.

SUMMARY OF ARGUMENT

A "variance" for fundamentally different plants is entirely consistent with, and indeed required by, the Clean Water Act. It is a recognition that the regulations promulgated by EPA are defective as to fundamentally different plants because EPA did not consider the statutory factors in relation to those plants in establishing industry-wide regulations. FDF variances are an appropriate mechanism for remedying this defect by applying the statutory factors to atypical plants, thus implementing congressional policy that only similar plants should be treated similarly.

This Court and others have upheld EPA's FDF variance regulation. Indeed the courts have required such a variance if EPA is to promulgate industry-wide regulations. While the prior judicial decisions have addressed only the FDF variance from BPT requirements, the same rationale applies equally to both BAT and pretreatment requirements. Absent the variance mechanism, EPA's industry-wide regulations would be unlawful as applied to atypical plants not considered by EPA in applying the statutory factors to determine the industry requirements.

Moreover, EPA is authorized by § 501(a) of the Clean Water Act, 33 U.S.C. § 1361(a) (1982), to issue whatever regulations are necessary to carry out the provisions of the Act. The FDF variance is necessary to insure that uniform regulations are applied to similar plants, and different regulations are applied to dissimilar plants. Even in the absence of such general rulemaking authority, however, courts have long recognized the discretion

of regulatory agencies to allow variances from rules of general applicability as a means of addressing particular situations. Such variances are necessary to assure due process in individual cases.

FDF variances are not modifications or waivers of applicable requirements; they are a mechanism for implementing the statutory requirements for a specific atypical plant not previously considered. Congress did not intend by adopting § 301(l) of the Clean Water Act to overrule this Court's decision in *du Pont* requiring FDF variances or EPA's practice of granting such variances to fundamentally different plants. Congress was aware of the *du Pont* decision and of EPA's practice of allowing FDF variances. If it sought to overrule them, it would have done so explicitly. Rather, § 301(l) was intended only to prohibit for toxic pollutants the waivers authorized by §§ 301(c) and (g) of the Act.

Finally, NRDC does not dispute that EPA could address atypical plants during its rulemaking on the industry-wide standards, if it were practically feasible to do so, and create separate regulations for toxic pollutants as appropriate for each atypical plant. NRDC does not claim that the congressional goal of uniformity or § 301(l) would bar such subcategorization where justified by the statutory factors. It objects only to EPA's chosen method of addressing atypical plants in individual proceedings rather than by rulemaking. NRDC is thus trying to dictate to EPA the procedures it must follow in applying the § 304 factors to atypical plants, contrary to decisions of this Court recognizing the discretion of an agency to proceed by rule or by adjudication.

ARGUMENT

I. A VARIANCE FOR FUNDAMENTALLY DIFFERENT PLANTS IS SUPPORTED BY THE LANGUAGE AND STRUCTURE OF THE CLEAN WATER ACT.

A. FDF Variances Are An Integral Part of the Technology-Based Requirements of the Act.

Congress clearly delineated the factors EPA is required to consider in establishing BPT and BAT effluent limitations guidelines. For BPT, EPA must consider the total cost of application of treatment technology in relation to the effluent reduction benefits to be achieved, as well as the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various control techniques, process changes, nonwater quality environmental impacts, and other factors that the Administrator deems appropriate. 33 U.S.C. § 1314(b)(1)(B) (1982). EPA must consider the same factors in establishing BAT limitations, except that the cost consideration is the total cost of achieving the expected effluent reduction, rather than the total cost in relation to benefits. 33 U.S.C. § 1314(b)(2)(B) (1982). Section 307(b) of the Act, 33 U.S.C. § 1317(b), requires EPA to promulgate pretreatment standards for those pollutants that are not susceptible to treatment by a publicly-owned treatment works or that would interfere with the operation of such works. While § 307 is silent on how such pretreatment standards are to be established, the legislative history indicates that they are to be technology-based:

> Under the amendment to Section 307(b) the Administrator would establish national pretreatment

> standards for toxic pollutants based on the best available technology economically achievable. . . .[16]

Thus EPA has been applying the § 304 statutory factors in the development of pretreatment standards for existing sources comparable to BPT and BAT.[17] This is entirely consistent with the NRDC Consent Decree.[18]

While Congress was quite precise in § 304 in enumerating the factors that EPA had to consider in developing effluent limitations guidelines, it was less than precise on how those guidelines were to be applied. Congress stated in § 301 of the Act, 33 U.S.C. § 1311 (1982), that dischargers had to comply with BPT, BAT and pretreatment standards, but did not specify who was to set those standards. Industry took the position that § 304 authorized EPA only to promulgate guidelines for industry categories, including ranges of effluent limitations, and that specific limits could be set only in a permit proceed-

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[16] H.R. Rep. No. 830, 95th Cong., 1st Sess. 87, *reprinted in A Legislative History of the Clean Water Act of 1977*, Comm. on Envt'l and Pub. Works, Serial No. 14, 95th Cong., 2d Sess. 271 (1978) (hereinafter cited as "1977 Leg. Hist.").

[17] The Agency has in addition been promulgating new source pretreatment standards for new indirect dischargers comparable to new source standards for direct dischargers.

[18] *See* note 7, *supra*. Section 307 authorizes a POTW to revise pretreatment standards for toxic pollutants to reflect the amount of pollutants that the POTW removes in its own treatment system. These so-called "removal credits" are available to *all* indirect dischargers—including both typical dischargers considered by EPA in developing pretreatment standards and atypical dischargers not considered by EPA. Removal credits were intended to further the intent of Congress that redundant treatment by POTWs and indirect dischargers be avoided to the extent possible. H.R. Rep. No. 911, 92d Cong., 2d Sess. 113 (1972); S. Rep. No. 1236, 92d Cong., 2d Sess. 120 (1972). Thus removal credits have nothing to do with the statutory factors considered in developing pretreatment standards and are entirely distinct from FDF variances.

ing on a case-by-case basis, taking into account the peculiarities of the particular plant. EPA argued in response that it was authorized by § 301 of the Act to set single-number effluent limitations for industry categories, based upon consideration of the § 304 statutory factors. This issue was ultimately joined in this Court in the *du Pont* case.

In *E. I. du Pont de Nemours & Co.* v. *Train*, 541 F.2d 1018 (1976), the United States Court of Appeals for the Fourth Circuit interpreted the Clean Water Act as allowing EPA to promulgate regulations setting forth specific BPT and BAT limits that would be presumptively applicable to classes and categories of existing dischargers. The court held, however, that the presumption could be rebutted by a particular facility in an application for a variance from these nationally uniform, industry-wide regulations. *Id.* at 1028.

On review by this Court, industry argued that the Act treated effluent limitations guidelines differently from pretreatment and new source standards. Industry argued that Congress gave EPA the authority to establish specific, numerical pretreatment and new source *standards* while at the same time allowing the Agency only to promulgate *guidelines* for BPT and BAT effluent limitations.[19] EPA responded that the statute "as a

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[19] If the industry position had prevailed in *du Pont*, there would be no need for FDF variances. Individual plant circumstances would be considered in establishing effluent limitations on a case-by-case basis in permit proceedings. Since the Court's construction of the Act leaves no room for such individual consideration of the statutory factors solely in permit proceedings, however, those factors must be considered somewhere. For typical plants, EPA considers those factors in the rulemaking to establish industry-wide requirements. The FDF variance proceeding is an appropriate mechanism for applying these statutory factors to atypical plants not considered in such rulemaking.

whole" shows that Congress used the terms "limitation" and "standard" as equivalents, and did not intend the use of one or the other to affect the scope of the Administrator's authority.[20] NRDC agreed with EPA's position, arguing strenuously that "the different statutory terms—'standards' and 'effluent limitations'—are of no relevance" in determining EPA's authority under § 301 of the Act.[21]

This Court held that EPA clearly had the authority to promulgate national uniform, industry-wide regulations for the second step of effluent limitations, namely BAT limits. *du Pont*, 430 U.S. at 126-27, 136. It based this decision on the language in § 301 that referred to "effluent limitations for categories and classes of point sources." *Id.* at 127. Although § 301 referred to the BPT limits as limitations "for point sources," the Court found that "[n]othing elsewhere in the Act . . . suggests any radical difference in the mechanism used to impose limitations" for BPT and BAT. *Id.* Thus this Court agreed with the Fourth Circuit that "the statute authorizes the 1977 [BPT] limitations as well as the 1983 [BAT] limitations to be set by regulation, *so long as some allowance is made for variations in individual plants*, as EPA has done by including a variance clause in its 1977 limitations." *Id.* at 128 (emphasis added).

The Court's rationale in *du Pont* applies equally to pretreatment standards for existing sources. As noted above, Congress clearly intended that pretreatment standards be established comparable to technology-based limits for direct dischargers. Accordingly, a variance is

[20] Brief for Respondents at 47, *du Pont*, *supra*.

[21] Brief for Natural Resources Defense Council, Inc. as *Amicus Curiae* at 39 n.104, *du Pont*, *supra*.

necessary to apply the statutory factors to establish pretreatment standards for atypical indirect dischargers.[22]

[22] The use of the words "standards" and "effluent limitations" in the Act is of no import. Both NRDC and EPA argued in *du Pont* that the words "standards" and "effluent limitations" were used interchangeably in the Act and that the terms had no regulatory significance. *See* discussion at 19-20, *supra*. NRDC based its position in part on the use of "standards" in § 316(b) to refer to § 301 effluent limitations and legislative history in which Congress referred to the setting of "standards" pursuant to §§ 301 and 306 of the Act. Brief for National Resources Defense Council, Inc. as *Amicus Curiae* at 39 n.104, *du Pont*, *supra*.

Because of the fundamental difference between existing dischargers and new source dischargers, this Court's decision in *du Pont* disallowing variances from new source standards should be limited to new source standards and new source pretreatment standards. As EPA explained in its brief in *du Pont*, an existing facility may have unique problems arising from its particular technology, operating methods or equipment that the Administrator could not—and did not—consider in promulgating standards for the industry category: "Variances are necessary to ensure that application of the general standards to existing plants that have those unique problems will not subject them to requirements *which are demonstrably inappropriate* for the particular facility." Brief for the Administrator of the Environmental Protection Agency at 13, *du Pont*, *supra* (emphasis added). Such regulations are "inappropriate" because they do not apply the statutory factors in determining the requirements for the atypical plant.

Similar problems do not exist for new sources—whether they be new source indirect dischargers subject to new source pretreatment standards or new source direct dischargers subject to new source standards. As EPA explained in its *du Pont* brief, since these new sources have not yet been constructed, application of one uniform set of standards to them cannot require them to make changes in their existing technology, operation or processes. *Id.* at 13-14. Thus, the application of such standards to them cannot result in demonstrably unfair requirements.

This Court reaffirmed the need for variances in the Clean Water Act's implementation in *EPA* v. *National Crushed Stone Association*, 449 U.S. 64 (1980). There, the Court noted that in cases where a discharger can show that its situation is not within the range of circumstances considered by the Administrator in establishing regulations for an industry category, "the variance is an acknowledgement that the uniform BPT limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, *that limitation is incomplete*." 449 U.S. at 77-78 (emphasis added).[23] While the decision in *National Crushed Stone Association* was addressed only to FDF variances from BPT requirements, the rationale applies equally to BAT requirements and pretreatment standards for existing sources.

In *National Crushed Stone Association*, the Court also discussed with approval EPA's description of the FDF

[23] Other courts had previously recognized that the FDF variance procedure is critical to EPA's promulgation of treatment requirements for existing sources. The United States Court of Appeals for the Tenth Circuit upheld regulations that had been challenged on the ground that they did not take the statutory factors into account across the industry because a variance procedure was available to apply those factors to fundamentally different plants. Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1244 (10th Cir. 1979). The D.C. Circuit in Weyerhaeuser v. Costle, 590 F.2d 1011, 1040-41 (1978), also upheld the promulgation of industry-wide effluent limitations because EPA's variance mechanism provided flexibility. The court held that the variance was "crucial." *Id.* *See also* American Frozen Food Institute v. Train, 539 F.2d 107, 131 (D.C. Cir. 1976); American Iron & Steel Institute v. EPA, 526 F.2d 1027, 1061 (3d Cir. 1975), *modified*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978).

variance as being not an exception to an applicable technology-based requirement, but rather an individualized determination of the appropriate requirements. *Id.* at 79 n.18. Quoting EPA, the Court noted that, by application of the variance mechanism, dischargers were not excused from meeting applicable requirements; they merely received individual determinations of the statutory requirements. *Id.* The Court noted further that it could not "attribute much weight to those passages in the legislative history . . . that express a desire and expectation that 'each polluter within a category or class of industrial sources . . . achieve nationally uniform effluent limitations. . . .' " *Id.* Since the variance was merely an individual determination of the appropriate statutory requirements, "all" point sources would meet the Act's requirements. That is precisely why § 301(l) of the Act does not preclude FDF variances.

Thus, FDF variances are entirely consistent with and authorized by the Clean Water Act. Without such variances, EPA's regulations, which ignore atypical plants in their development, would be "incomplete" and run afoul of §§ 301 and 304 of the Act.

B. Variances Are Also Authorized By EPA's General Rulemaking Authority.

Section 501(a) of the Act, 33 U.S.C. § 1361(a), authorizes the Administrator of EPA "to prescribe such regulations as are necessary to carry out his functions" under the Act. As discussed in Part I.A. above, the FDF variance regulation is clearly necessary to implement the requirements of the Act.

Faced with the enormous task of applying the § 304 factors to establish discharge requirements for thousands and thousands of point sources, EPA realized at an early stage that this task could be done only by focusing on

typical plants within an industry. Even with this limitation, it has taken EPA much longer than Congress anticipated to promulgate the necessary requirements; indeed the task is not yet done. EPA also realized that, as this Court has held, its regulations would be incomplete if it did not take the statutory factors into account for all plants in an industry category, including atypical plants. Thus, to insulate its industry-wide regulations from attack on the ground that they did not apply the factors to atypical plants, EPA established the FDF variance regulation to address atypical situations. This is an entirely reasonable exercise of the Agency's authority under § 501 of the Act to promulgate such regulations as are necessary to carry out its obligations under the Act.

Moreover, the courts have long recognized an agency's inherent power to allow variances from rules of general applicability in order to address atypical situations.

In a case involving regulations of the Federal Communications Commission, the United States Court of Appeals for the District of Columbia Circuit emphasized that "a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties" because the power of an agency to promulgate general regulations in the public interest "does not relieve it of an obligation to seek out the 'public interest' in particular individualized cases."[24] The court noted further that

> [t]he agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exception based on special circumstances.[25]

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[24] WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[25] *Id.*

This Court, too, has recognized the authority of an agency to establish variance mechanisms to address peculiar factual situations. In *United States* v. *Allegheny-Ludlum Steel*, 406 U.S. 742 (1972), this Court recognized the authority of the Interstate Commerce Commission to exempt certain carriers from its regulations. The Court stated:

> It is well established that an agency's authority to proceed in a complex area such as car-service regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances.[26]

And in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court permitted the Federal Power Commission to exempt small gas producers from its regulations despite the fact that the statutory language empowering the Commission to promulgate regulations was "without qualification or exception."[27]

The rationale of the Court in the above cases applies equally in this case. The establishment of discharge limitations for thousands of diverse plants is a complex task. The authority to establish such limitations by general rule entails a concomitant authority to provide a variance procedure to address peculiar, atypical plants.[28] Judge Leventhal of the D.C. Circuit aptly stated:

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[26] 406 U.S. at 755.

[27] 390 U.S. at 783-84.

[28] This Court may have implicitly relied upon this rationale in its decision in *du Pont* requiring an FDF variance from BPT regulations even though the statute does not expressly provide for such a variance. The Court did not explain whether its decision was required by §§ 301 and 304 of the Act, or whether it was based upon the agency's inherent authority when proceeding by general rules in a complex area.

> Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them.[29]

There is no "unambiguous demonstration" in the Clean Water Act that Congress intended to foreclose FDF variances for existing sources. While § 301(l) prohibits modifications of § 301 requirements for toxic pollutants, it does not prohibit—"unambiguously" or otherwise—FDF variances for toxic pollutants. As noted above, application of the § 304 factors to atypical plants requires such variances, and § 501 authorizes the promulgation of the variance regulation.[30]

Procedures such as the FDF variance serve to "ameliorate the rigors of mechanical application of the rules in appropriate cases without making the application of the rules unduly complex for the agency."[31] And a procedure for considering variance applications in a generally applicable regulation "[i]n some sense . . . imparts a construction of 'reasonableness' to the standards as a whole and adopts a more flexible system of regulation than can be had by a system devoid of 'give.' "[32] In addition, this Court has repeatedly upheld regulations in part because an exception provision in the regulations helped assure the parties of due process.[33]

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[29] Alabama Power Co. v. Costle, 636 F.2d 323, 357 (D.C. Cir. 1980).

[30] *See also* the discussion in Part II, *infra*.

[31] Gulf Oil Corp. v. Hickel, 435 F.2d 440, 447 (D.C. Cir. 1970).

[32] Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 399 (1973), *cert. denied*, 417 U.S. 921 (1974). *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 641 (D.C. Cir. 1973).

[33] *See* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972); FPC v. Texaco, 377 U.S. 33, 40-41 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). The absence of a variance provision has from time to time in fact been fatal to a statute. *See, e.g.*, United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973), in which Justice Marshall stressed in his concurring opinion that only similarly situated people should be treated similarly. *Id.* at 517.

There can thus be no doubt that EPA is authorized both by § 501(a) of the Act and by its inherent authority to allow FDF variances from regulations applicable to an industry category for atypical plants. This is reinforced by the fact that, as this Court has recognized, an FDF variance is not in fact an exemption from or waiver or modification of an applicable standard; it is a determination of the appropriate standard under § 304 for an atypical plant. The variance is therefore not a loophole in the statute. By virtue of the fact that its application is circumscribed by the § 304 factors, it is a limited safety valve. And because of its limited nature, it has not proven to be an administrative burden on EPA's resources. Indeed, it would be a greater burden on EPA if the Agency were required to consider *all* plants—including fundamentally different plants—in developing regulations for an industry category.

II. IN ENACTING § 301(l), CONGRESS DID NOT INTEND TO PROHIBIT EPA FROM GRANTING FDF VARIANCES FOR TOXIC POLLUTANTS.

Section 301(l) of the Act states that EPA may not modify the requirements of § 301 for toxic pollutants. The Court below accepted NRDC's argument that an FDF variance is a modification within the meaning of § 301(l). The basic error in this ruling lies in failing to understand that an FDF variance implements the statute's technology-based requirements rather than modifying or supplanting them.[34]

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[34] *See* discussion at 8-9, *supra*.

Section 301 of the Act requires, *inter alia*, that direct and indirect dischargers achieve technology-based effluent limitations and standards. For toxic pollutants, such requirements are generally set at "best available technology" or "BAT" levels. When a plant receives an FDF variance, it is *not* relieved of its obligation to achieve a BAT limitation or standard under § 301 of the Act. Instead, it is simply receiving an individualized BAT limitation or standard, based on the application of the statutory BAT factors to that plant.

A plant receiving an individual FDF determination for BAT is as much subject to the technology-based requirements of § 301 of the Act as plants subject to the industry-wide BAT regulations. The FDF variance results in an effluent limitation or standard for a discharger based on statutory factors that would have required such limits or standards had EPA been able to take the factors into account during the industry rulemaking. Thus, an FDF variance is simply a different procedure for *implementing* the technology-based requirements of § 301 of the Act; it is not a modification of those requirements forbidden by § 301(l).

In light of the fact that EPA has consistently relied upon the FDF variance in promulgating technology-based requirements under the Clean Water Act and the fact that the courts have held that such variances are an integral part of EPA's program, it is highly unlikely that Congress would have prohibited such variances without expressly stating that it was doing so. Congress was clearly aware in 1977 of EPA's variance procedure and of this Court's decision in *du Pont*, yet the legislative history of § 301(l) indicates no intent to overrule the procedure or *du Pont*. Rather the legislative history of § 301(l), which was originally introduced as part of §§ 301(c) and

(g), indicates that Congress intended only to limit the authority of EPA under §§ 301(c) and (g) of the Act to waive on a case-by-case basis applicable BAT and pretreatment requirements for toxic pollutants.

Section 301(c) of the Act was enacted by Congress in 1972.[35] As adopted, it allowed EPA to waive BAT and pretreatment requirements on a case-by-case basis for all pollutants when economic circumstances so justified. In 1977, the Senate decided to amend § 301(c) to prohibit such waivers for toxic pollutants. Thus, the Senate bill added a clause to § 301(c) prohibiting economic waivers for toxic pollutants.[36]

At the same time, the Senate decided to allow waivers from BAT and pretreatment standards where such waivers would not impair water quality. S. 1952 therefore contained a new § 301(d), which later became § 301(g), specifically authorizing such water quality waivers. Section 301(d) also contained a clause identical to the Senate's proposed amendment to § 301(c) prohibiting the Administrator from granting water quality waivers for toxic pollutants; it did not contain the parenthetical clause which now appears in § 301(g) limiting § 301(g) to pollutants "other than [conventional] pollutants identified pursuant to section 304(a)(4) of this Act, toxic pollutants subject to section 307(a) of this Act, and the thermal component of discharges."[37]

During the Conference Committee deliberations on the amendments to the Clean Water Act, it was decided that,

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[35] Pub. L. 92-500, 92d Cong., 2d Sess. (1972).

[36] *See* S. 1952 and S. Rep. No. 370, 95th Cong., 1st Sess. 44 (1977).

[37] The 1977 House bill to amend the Clean Water Act did not contain a comparable water quality waiver provision. H.R. 3199, 95th Cong., 1st Sess. (1977).

rather than repeating the identical limiting clause at the end of § 301(c) and what had become § 301(g) of the Act, the limitation would be put into a separate § 301(l). In commenting on the Conference Report, Representative Roberts, one of the leaders in the House of Representatives for the 1977 amendments to the Act, stated:

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the dischargers nor 301(g) waivers based on water quality considerations shall be available.[38]

Recognizing that the legislative history of § 301(l) indicates that Congress was concerned primarily with prohibiting §§ 301(c) and (g) waivers for toxics, the Third Circuit nevertheless found it difficult to imagine why Congress would have disallowed such waivers for toxic pollutants and still permitted FDF variances for toxics. 719 F.2d at 646; Pet. Appx. at A-43. This difficulty results from a fundamental misunderstanding of the difference between §§ 301(c) and (g) modifications and FDF variances.

Sections 301(c) and (g) allow a discharger to avoid compliance with applicable requirements based on the individual discharger's economic capability or water quality considerations. As this Court has recognized, a dis-

[38] 1977 Leg. Hist. at 328-29. Also during the Conference Committee deliberations, the above-quoted parenthetical clause was added to § 301(g). Congress did not explain the addition of the clause, but its inclusion of conventional pollutants and thermal discharges (which had not been excluded from § 301(g) in the Senate bill and were not covered by the new § 301(l)) make it appear that the clause was directed primarily at those pollutants, with the reference to toxics being included for the sake of completeness.

charger that satisfies the requirements of § 301(c) qualifies for a variance "simply because the [discharger] could not afford a compliance cost that is not fundamentally different from those the Administrator has *already considered*. . . ." *National Crushed Stone Association*, *supra*, 449 U.S. at 78 (emphasis added). Similarly, § 301(g) waivers may be granted to typical dischargers simply because compliance with the technology-based limits is not necessary to protect water quality. Thus a discharger may under §§ 301(c) or (g) obtain a modification of applicable requirements on grounds different than EPA may consider in making the technology-based determinations under the FDF procedure.

The distinction between an FDF variance and a statutory modification under §§ 301(c) and (g) lies in the statutory requirements which apply. An FDF variance from BAT would be based on an acknowledgment that the BAT regulation for the plant is deficient or incomplete, and an individualized determination of BAT for the plant based on the statutory criteria for BAT.[39] A plant cannot obtain an FDF variance for reasons of economic unaffordability or good water quality because those reasons are not factors set forth in the Act for BAT.[40] In contrast, a plant may obtain a § 301(c) or (g) modification for reasons of economic affordability or water quality.[41] Unlike an FDF variance, a § 301(c) or (g) modification is not an acknowledgment that the technology-based BAT limitation is incomplete or deficient. Instead, it is a modification of an otherwise valid BAT limitation based on factors different from those set forth in the Act for BAT.

[39] *See* 33 U.S.C. § 1314(b)(2) (1982).

[40] The EPA regulation expressly precludes a variance on those grounds. *See* 40 C.F.R. § 403.13(e)(3) and (4) (1983); Pet. Appx. at A-124.

[41] *See* note 5, *supra*.

Congress was aware both of this Court's decision in *du Pont* and of EPA's practice of granting FDF variances when the 1977 amendments to the Clean Water Act were adopted. NRDC itself brought variances to the attention of Congress. In testimony before the Subcommittee on Environmental Pollution, NRDC testified that a "fundamental variance provision" was integral to the Act's system of "national, uniform, minimum effluent limitations."[42] This Court's decision in *du Pont*, as well as an early decision of the Fourth Circuit upholding variances in *Appalachian Power Co.* v. *Costle*, 545 F.2d 1351 (4th Cir. 1976), were both brought to the attention of Congress during the debate on the 1977 amendments. Representative Clausen, ranking minority member of the Subcommittee on Water Resources, stated during the House debate on the Conference Report to the final 1977 amendments that "[a] full understanding of Public Law 92-500 [the 1972 Clean Water Act] can only be achieved by having an understanding of the case law interpreting the public law."[43] At this point, Rep. Clausen referred to a Library of Congress report on case law under the Clean Water Act.[44] That report specifically discussed *du Pont* and *Appalachian Power*.[45]

The fact that Congress did not override or expressly limit EPA's FDF variance procedure after its attention

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[42] *See* Federal Water Pollution Control Act Amendments of 1977, Hearings before the Subcommittee on Envt'l Pollution of the Senate Comm. on Envt'l and Pub. Works, 95th Cong., 1st Sess., Serial No. 95-H25, Part 9, at 37 (1977).

[43] 1977 Leg. Hist. at 374.

[44] This report was printed as "Case Law Under the Federal Water Pollution Control Act Amendments of 1977," Library of Congress, Congressional Research Service, House Public Works and Transportation Committee Print 95-35.

[45] *Id.* at 20, 28.

was directed to it is evidence that Congress did not intend to circumscribe the procedure. As a general rule, "a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval."[46] Moreover, this Court has held that Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.[47] These presumptions are particularly strong when Congress explicitly disapproves of some cases interpreting the Act, as it did in the legislative history of the 1977 amendments to the Clean Water Act.[48] Consequently, the failure of Congress expressly to limit FDF variances or to reject this Court's *du Pont* decision can only be construed as approval and acceptance of the procedure as adopted and implemented by EPA.[49]

The Third Circuit's decision below is not only contrary to the intent of Congress, it also conflicts with the decision of the only other court to address the scope of § 301(l). In *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (4th Cir. 1980), NRDC argued that § 301(l) barred

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[46] Kay v. FCC, 443 F.2d 638, 646-47 (D.C. Cir. 1970); *see also* Sands, 2A *Statutes and Statutory Construction*, § 49.09 (4th ed. 1973).

[47] Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 382 n.66 (1981).

[48] *See* 1977 Leg. Hist. at 693 (rejecting Sixth Circuit holding that some circumstances justified extension of BPT compliance date), 701 (rejecting Eighth Circuit holding that U.S. Corps of Engineers was exempt from state environmental law).

[49] If Congress had intended to disallow FDF variances, and thus require dissimilar plants to be grouped together and treated similarly, this would raise substantial due process questions.

FDF variances for toxic pollutants. The Fourth Circuit recognized that EPA had interpreted § 301(l) as applying only to §§ 301(c) and (g) and stated that the interpretation of the Agency is entitled to deference. 620 F.2d at 1048. The court concluded that § 301(l) "does not apply so as to require the exclusion of toxic substances" from the FDF variance regulation. 620 F.2d at 1048. The Fourth Circuit was correct in its decision.[50]

III. THE DECISION OF THE THIRD CIRCUIT UNLAWFULLY INFRINGES ON EPA'S DISCRETION TO PROCEED BY RULE OR BY ADJUDICATION.

If a plant is fundamentally different from the plants considered by EPA in developing requirements for the industry, it is improper under the Act to apply the requirements to it. The issue before this Court is whether the procedure EPA has adopted to deal with fundamentally different plants is appropriate.

There are several ways in which EPA could apply the statutory factors to atypical plants. In theory, EPA could address atypical plants as part of the rulemaking proceeding to establish limitations and standards for an industry category. When EPA develops such industry-wide regulations, it generally finds it necessary in applying the § 304 statutory factors to divide the industry into different groups, or subcategories, and to apply different sets of limits for toxic and nontoxic pollutants for each subcategory. Thus, where justified by the statutory factors, EPA could establish a separate subcategory for each atypical plant (or group of plants) and apply different

[50] NRDC did not petition this Court for a writ of certiorari to review the Fourth Circuit's decision.

toxics limits to that subcategory.[51] Alternatively, EPA could promulgate industry-wide regulations and then consider petitions for rulemaking to amend those regulations to create new subcategories for atypical plants.[52]

EPA clearly has the authority to subcategorize the industry as much as is necessary to reflect relevant differences among plants. Moreover, subcategorization of an industry is within the sound discretion of EPA unless the Agency acts arbitrarily and capriciously.[53] The objective of such subcategorization is to ensure, consistent with the objectives of the Clean Water Act, that similar plants are subject to similar requirements.[54]

NRDC itself concedes that EPA has considerable discretion in establishing subcategories and that, more importantly, EPA can establish subcategories for individual plants that are significantly different from the other plants in an industry. At oral argument below, NRDC stated:

> We have never contended either in the [NRDC] consent decree or in the context of specific effluent guidelines that EPA does not have considerable discretion in the creation of subcategories. EPA, for

[51] This course has proved impractical, however. EPA is simply unable to collect or consider all the relevant data to establish the necessary subcategories during the rulemaking, particularly within the time frames contemplated by the Act and imposed by the NRDC Consent Decree. *See* note 7, *supra*. As a result, EPA considers only typical plants during the industry-wide rulemaking proceeding, leaving to the FDF variance proceeding atypical plants that the Agency cannot consider.

[52] NRDC appears to agree that EPA could follow this course of action. *See* NRDC v. EPA, *supra*, 537 F.2d at 647.

[53] Kennecott Copper Corp. v. EPA, *supra*, 612 F.2d at 1236, 1246.

[54] *See* note 4, *supra*.

> example, is considering a *subcategory for only one discharger* in the context of the ore mining category. And similarly the agency has created a category for only three inorganic chemical companies. These examples are given only to demonstrate that *we accept the fact that EPA will* in the context of the effluent guidelines themselves, in some cases *have to address specific significant differentiating factors between dischargers* consistent with the criteria in section 304(b).[56]

Thus, NRDC's arguments below that the Act requires the application of uniform standards to indirect dischargers and that § 301(l) prohibits the application of individual standards to atypical dischargers are specious. NRDC agrees that EPA can establish toxics limits for individual plants in separate subcategories as part of the rulemaking proceeding to establish discharge requirements for an industry category.

The only issue, therefore, is whether the FDF variance mechanism that EPA has adopted to address atypical plants—which provides for public notice of the FDF application, and an opportunity for public comments and a public hearing[56]—is appropriate, not whether § 301(l) bars individual toxics limits for fundamentally different plants. The decision of the Third Circuit prohibiting the use of the FDF procedure to establish limits for atypical plants unlawfully infringes upon EPA's discretion to proceed by rule or by adjudication, contrary to this Court's decision in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), and its progeny.[57]

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[55] Transcript at 252 (emphasis added). Counsel for NRDC also agreed that EPA "can implement the pretreatment standards flexibly . . . through subcategories." (Transcript at 247).

[56] *See* 40 C.F.R. § 403.13.

[57] *See also* NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-95 (1974); NAACP v. FPC, 425 U.S. 662, 668-69 (1976).

In *Chenery*, the issue was whether the SEC was required to issue a rule prohibiting certain actions or whether it could hear those same actions in individual cases. The Court emphasized that, as here, "problems may arise in a case which the administrative agency could not reasonably foresee," or the problems may be "so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule."[58] The Court concluded that

> the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. . . . [T]he choice made between proceeding by a general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.[59]

In barring EPA's informed choice of the FDF procedure to deal with atypical plants, the decision below unlawfully infringes on EPA's discretion to proceed by rule or by adjudication,[60] and on EPA's inherent authority to allow variances to ameliorate the rigors of the mechanical application of general rules to particular facts.[61]

Moreover, disallowing the use of variances at this late stage in EPA's development of discharge limitations would create confusion in the program. The Agency has promulgated guidelines and standards for many major industries based upon consideration of typical plants, deferring atypical plants to FDF variance proceedings. If the decision below is allowed to stand, then the basis for these regulations is subject to question. If § 301(l) were to

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[58] 332 U.S. at 202-03.

[59] *Id.* at 203.

[60] *See also* NRDC v. EPA, *supra*, 537 F.2d at 647.

[61] *See* discussion at 23-26, *supra*.

preclude variances for toxic pollutants, EPA might well be subject to requests by industry to reopen previously promulgated regulations to address the atypical plants. If the Agency refused to do so, its regulations would be subject to challenges in the courts.[82]

In addition, EPA is currently developing regulations for the remaining industry categories pursuant to a court-ordered timetable.[83] These regulations include the requirements for the organic chemicals and plastics and synthetic fibers industry, which by EPA's own estimates

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[82] EPA's effluent limitations and standards regulations have in the past been held invalid for failure to consider relevant factors. American Iron & Steel Institute v. EPA, *supra*, 526 F.2d 1027 (3d Cir. 1975), *modified*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); FMC Corp. v. Train, 539 F.2d 973 (4th Cir. 1976); Tanners' Council of America v. Train, 540 F.2d 1188 (4th Cir. 1976). Some regulations were upheld by the courts on the grounds that the FDF variance procedure was available to address atypical situations. *See* note 23, *supra*.

While § 509(b)(1) of the Act, 33 U.S.C. § 1369(b)(1) (1982), generally requires that petitions to review EPA guidelines and standards be filed within 90 days of the promulgation of such guidelines or standards, § 509 explicitly allows late petitions for review if such petitions are based on grounds that arose after expiration of the 90-day period. A decision of this Court disallowing FDF variances would undoubtedly be a sufficient basis for the filing now of petitions for review.

In addition, plants often do not become aware of the need for a variance until they have installed the necessary treatment system and it fails to achieve the expected discharge limits. This would ordinarily not occur until three years after promulgation of applicable EPA regulations. Thus, additional plants already subject to regulations may be expected to apply for variances in the future. While EPA's regulations may require variance applications to be filed sooner, EPA has not yet ruled on whether it will accept late applications, and no court has sustained that time-deadline requirement.

[83] *See* note 7, *supra*.

will cover between 1200 and 2100 facilities. A change in the procedures to address atypical plants will only complicate and further delay EPA's efforts to complete the rulemaking process for the remaining industry categories.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit prohibiting FDF variances for toxic pollutants should be reversed.

Respectfully submitted,

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APPENDIX

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Clean Water Act Provisions 1a

CLEAN WATER ACT PROVISIONS

1. Section 301(c) of the Clean Water Act, as amended, 33 U.S.C. § 1311(c) (1982):

> (c) Modification of timetable
>
> The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

2. Section 301(g) of the Clean Water Act, as amended, 33 U.S.C. § 1311(g) (1982):

> (g) Waiver for certain pollutants
>
> (1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—
>
> (A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;
>
> (B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and
>
> (C) such modification will not interfere with the attainment or maintenance of that water quali-

ty which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

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Nos. 83-1013 and 83-1373

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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QUESTION PRESENTED

Whether Section 301(*l*) of the Clean Water Act, 33 U.S.C. 1311(*l*), bars the Environmental Protection Agency from granting variances from national pretreatment standards for toxic pollutants to plants having fundamentally different factors from those considered by EPA in establishing the national standards.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1013

CHEMICAL MANUFACTURERS ASSOCIATION, ET AL.,
PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

No. 83-1373

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A88)[1] is reported at 719 F.2d 624.

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[1] "Pet. App." refers to the Appendix to the Petition in No. 83-1013.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1983. The petition for a writ of certiorari in No. 83-1013 was filed on December 19, 1983. By order dated December 12, 1983, Justice Brennan extended the time to file a petition for a writ of certiorari in No. 83-1373 until February 17, 1984, and the petition was filed on that date. The petitions were granted, and the cases were consolidated on April 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, are reproduced at Pet. App. A116-A121. The "fundamentally different factors" (FDF) variance provision, 40 C.F.R. 403.13, is reproduced at Pet. App. A122-A127.

STATEMENT

The Clean Water Act, 33 U.S.C. 1251 *et seq.*, requires the Administrator of the United States Environmental Protection Agency (EPA) to regulate two types of industrial facilities: (1) "direct" dischargers, *i.e.*, facilities that discharge waste water directly into navigable waters; and (2) "indirect" dischargers, *i.e.*, facilities that discharge waste water into publicly owned treatment works (POTWs) prior to discharge into navigable waters. For both types of dischargers, EPA conducts rulemaking proceedings and promulgates nationwide, technology-based requirements applicable to categories of dischargers (*e.g.*, iron and steel, metal finishing, and leather tanning).

In each rulemaking proceeding, EPA attempts to gather as much data as possible regarding facilities in the particular category. Nationwide requirements for all plants in that category are based on these data. On occasion, however, the Agency may be unaware of or may not consider a factor that is applicable to a few plants and that would dictate a change in the requirements applicable to those facilities. The EPA has therefore developed a mechanism by which the national requirements may be adjusted, on a case-by-case basis, to better suit those few atypical plants. This vehicle is known as the "fundamentally different factors" (FDF) variance. As its name suggests, this mechanism allows variances for existing sources that can demonstrate that their situation is characterized by factors that are "fundamentally different" from those considered by EPA in developing the national rule for their category.

In this case, the court of appeals held that the Clean Water Act prohibits EPA from issuing such FDF variances to indirect dischargers[2] with respect to all pollutants identified under the Act as toxic. The issue in this case is whether the court's conclusion is correct.

1. Because the agency's regulation of indirect dischargers is patterned after its regulation of direct

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[2] The FDF variance provision for indirect dischargers, which was struck down by the court of appeals in this case, is found at 40 C.F.R. 403.13 (Pet. App. A122). EPA has promulgated an analogous provision for direct dischargers, 40 C.F.R. 125.30 *et seq.*, which the respondent herein has challenged in the United States Court of Appeals for the District of Columbia Circuit. *NRDC* v. *EPA*, No. 80-1607 and consolidated cases. That case has not yet been briefed. As discussed below, the court of apepals' reasoning in this case would apply equally to direct dischargers.

dischargers, a brief review of the statutory scheme applicable to both types of dischargers is nceessary. The Act requires direct dischargers to be regulated through phased implementation of technology-based requirements. By July 1, 1977, existing direct dischargers were required to meet effluent limitations based on the "best practicable control technology currently available" (BPT). 33 U.S.C. 1311(b)(1)(A). By July 1, 1984, such dischargers were obligated to meet potentially more stringent effluent limitations for toxic pollutants based upon the "best available technology economically achievable" (BAT). 33 U.S.C. 1311(b)(2)(A) and (C). "New source" direct dischargers must meet new source performance standards (NSPS) based on the "best available demonstrated control technology" (BADT). 33 U.S.C. 1316. The Act required the Administrator to amass a wide range of information and to publish "regulations, providing guidelines," based upon specific criteria, for the BPT and BAT effluent limitations and new source performance standards. 33 U.S.C. 1314(b)(1)(B), (b)(2)(A), and (B). See *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116 (1977) [hereinafter *duPont*].

2. The development of national technology-based requirements for direct and indirect dischargers has proven to be an enormous and complex undertaking. For each industrial category, the Agency and its contractors typically seek to obtain as much information as possible regarding all of the relevant factors, including the types of industrial processes involved, water use practices, the nature and amounts of pollutants in raw waste water, and the costs and effectiveness of various waste water treatment technologies. Questionnaires requesting information on these

matters, as well as cost and financial data, are typically sent to at least a cross section of affected plants. Representative facilities are then selected for visits and on-site sampling in order to gain more detailed information. Data are collected on the treatment efficiency of technologies already being used, and tests are often conducted to determine the feasibility and effectiveness of other potential technologies. In addition, the Agency's contractors attempt to determine model costs (both capital and annualized) for various treatment technologies and, using available financial data, they assess the potential impacts on the industry, including estimated plant closures and the effect on employment and prices. The treatment efficiency of each technology is determined on a national basis through the combined use of statistical analyses and engineering judgments.[3] In most instances, EPA has found that application of one or more of the statu-

[3] The scope of the task of formulating national categorical standards is illustrated by the procedures followed by EPA in developing the BPT-level electroplating pretreatment standards that were unsuccessfully challenged in the proceedings below. EPA initially sent questionnaires to over 500 plants that it had identified as possibly falling within the category. Of these plants, approximately 200 provided at least some of the requested information. On the basis of the responses, EPA conducted on-site visits of 82 plants to take samples of raw and treated waste water over several days, inspect treatment technology already in place, and collect other first-hand information. These visits enabled EPA to determine that approximately 25 of the plants were representative in terms of treatment technology, character of raw waste water, and other factors. The data from these plants were then used to derive achievable effluent limitations, using a combination of statistical methodologies and engineering judgments.

tory factors warrants different requirements for separate subcategories within the national category.[4]

3. During the rulemaking process, the Agency attempts to obtain all pertinent information. However, due to the magnitude of the effort involved in each categorical rulemaking, the Agency occasionally may not consider a unique factor that applies to a few plants and would dictate a change in the requirements applicable to those facilities. In addition, a particular plant may be so different from all of the other plants considered by the Agency that the factors generally deemed relevant to the treatment capabilities of the other plants are inapplicable to the circumstances of that particular plant.

Moreover, from the outset EPA has been subjected to very stringent court-ordered deadlines for developing these technology-based regulations. Section 304 (b)(1) of the Act, 33 U.S.C. 1314(b)(1), directed EPA to issue BPT guidelines for all industrial categories within one year after the statute's enactment, *i.e.*, by November 1973. This task proved impossible, and in 1973 the respondent herein, the Natural Resources Defense Council, Inc. (NRDC), sued the Agency to establish these guidelines. As a result of this litigation, EPA was placed under a timetable for promulgating BPT effluent limitations guidelines for categories of direct dischargers. *NRDC* v. *Train*, 6 Env't Rep. Cas. (BNA) 1033 (D.D.C. 1973), rev'd in part and remanded in part, 510 F.2d 692 (D.C. Cir. 1974). Because of these schedules and the fact that the guidelines required under Section 304 of the Act, 33 U.S.C. 1314, had not yet been issued, the

[4] For example, in the BPT electroplating pretreatment rulemaking, the electroplating category was subdivided into seven categories. 40 C.F.R. Pt. 413.

Agency adopted a regulatory approach that combined its obligations under certain provisions of the Act. Specifically, EPA developed "effluent limitations guidelines" for each industrial category. These were intended to constitute both the guidelines required by Section 304 and the nationally applicable effluent limitations that, under Section 301(b), 33 U.S.C. 1311(b), must be achieved by all dischargers within the category.[5] In view of the complexity of the national rulemaking efforts for each category, EPA included in its categorical regulations an FDF variance provision to ensure that facilities with unique, plant-specific factors were not unfairly treated as a result of the tight judicial deadlines.[6]

EPA's approach came under attack from both sides. On the one hand, industry challenged EPA's authority to establish BPT requirements, contending that EPA could only set guidelines under Section 304 of the Act and that only individual permit writers could set the specific effluent limitations applicable to each facility within the category. On the other hand, NRDC, while accepting EPA's authority to establish BPT requirements for categories of dischargers, argued that the Agency could not authorize FDF variances based on plant-specific factors.

A number of courts of appeals issued conflicting rulings with respect to industry's challenge.[7] NRDC's challenge, however, was rejected in *NRDC* v. *EPA*,

[5] See generally Parenteau & Tauman, *The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972?*, 6 Ecology L.Q. 1 (1976).

[6] *E.g.*, 40 C.F.R. 415.220 *et seq.* (1976) (inorganic chemicals).

[7] See cases collected in *duPont*, 430 U.S. at 125.

537 F.2d 642 (2d Cir. 1976), which upheld the FDF variance provision as an appropriate "administrative safety valve" that "permits a more rigorous adherence to an effective regulation" and that accommodates the need to promulgate national regulations quickly while allowing individual problems to be dealt with later (*id.* at 646-647).[8]

Ultimately, EPA's approach was upheld by this Court in *duPont*. The Court held that EPA had properly construed its authority under Sections 301 and 304 of the Act and that the Agency has the authority to issue nationally applicable regulations for existing direct dischargers, "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations" (430 U.S. at 128 (footnote omitted)).[9]

4. The Agency's regulatory effort with respect to indirect dischargers has been patterned after its approach with respect to direct dischargers. Indirect dischargers are subject to "pretreatment" standards applicable to pollutants, including toxic pollutants, that are not susceptible to treatment by or would

[8] The District of Columbia Circuit likewise approved of EPA's approach of setting nationally applicable BPT regulations tempered by the FDF variance mechanism. *American Frozen Food Institute* v. *Train*, 539 F.2d 107, 131 (1976).

[9] Several courts of appeals subsequently took note of *duPont* in emphasizing the importance of the FDF variance mechanism to the categorical rulemaking process. *E.g.*, *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1037 (D.C. Cir. 1978); *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979); *Appalachian Power Co.* v. *Train*, 620 F.2d 1040, 1044-1048 (4th Cir. 1980).

interfere with the operation of POTWs.[10] 33 U.S.C. 1317(b). Like the direct discharger requirements, pretreatment standards must be established by notice-and-comment rulemaking for categories of dischargers. 33 U.S.C. 1317(b)(3). And as with direct discharger requirements, EPA was required by Section 304(g)(1) of the Act, 33 U.S.C. 1314(g)(1), to publish guidelines for the establishment of pretreatment standards. EPA decided at an early stage to use the technology-based criteria specified by statute for direct dischargers as the basis for indirect discharger requirements. However, as was the case with the direct discharger requirements, the Agency fell behind in promulgating pretreatment standards, and NRDC soon brought suit seeking a court-ordered schedule for promulgating pretreatment standards. That litigation culminated in a consent decree that placed EPA under stringent deadlines for promulgating categorical pretreatment standards. The decree also incorporated EPA's preferred regulatory approach of using the technology-based BPT, BAT, and NSPS criteria to develop the indirect discharger requirements. *NRDC* v. *Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), modified *sub nom.* *NRDC* v. *Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979), modified *sub nom. NRDC* v. *Gorsuch*, No. 2153(D.D.C. Oct. 26, 1982), modified *sub nom.* *NRDC* v. *Ruckelshaus*, No. 2153 (D.D.C. Aug. 2, 1983 & Jan. 6, 1984). In subsequent amendments to the Act in 1977, Congress sanctioned this approach to establishing pretreatment standards. See *Environ-*

[10] Indirect dischargers that would be considered new sources under 33 U.S.C. 1316 if they were direct dischargers are subject to new source pretreatment standards. 33 U.S.C. 1317(c).

mental Defense Fund, Inc. v. *Costle*, 636 F.2d 1229, 1244 (D.C. Cir. 1980).

Since the pretreatment regulatory effort was patterned after the approach to direct dischargers, when EPA turned its attention to establishing pretreatment standards, it similarly provided an FDF variance mechanism in its General Pretreatment Regulations for existing indirect dischargers. 40 C.F.R. 403.13.[11] This provision allows EPA to establish a *more or less* stringent standard if the affected facility, the POTW, or any other interested person shows (1) that the facility is fundamentally different from other plants in the category with respect to one or more of the factors considered by EPA in establishing the standards and (2) that compliance with the national standard would result either in a pollutant removal cost wholly out of proportion to the costs considered by EPA in setting the national standard or a non-water-quality environmental impact (such as the amount of energy required) that is fundamentally more adverse than those considered in developing the standard. 40 C.F.R. 403.13(c). Among the factors that may justify a variance are the nature, quantity, or combination of pollutants in a particular facility's wastewater; the volume of wastewater discharged by a facility; the amount of energy required for a facility to meet the pretreatment standard; the amount of space available for installation of the required control technology; and the cost of compliance. 40 C.F.R. 403.13(d). However, factors having nothing to do with the appropriateness of the pretreatment standard—such as a particular

[11] In accordance with *duPont* (see 430 U.S. at 137), FDF variances are not allowed for new source indirect dischargers. See 40 C.F.R. 403.13(b).

facility's "ability to pay for the required waste treatment" (40 C.F.R. 403.13(e)(3))—are not grounds for a variance.

The FDF variance does not excuse compliance with a correct requirement but instead represents an acknowledgement that not all relevant factors were taken sufficiently into account in framing the requirement in the first place. As the Agency has described it (44 Fed. Reg. 32854, 32893 (1979)):

> No discharger * * * may be excused from the Act's requirement to meet * * * a pretreatment standard through this variance clause. A discharger may instead receive an individualized definition of such a * * * standard where the nationally prescribed limit is shown to be more or less stringent than appropriate for the discharger under the Act.

In effect, the FDF variance creates a new subcategory for the discharger in question based on factors that would have justified—and required—the creation of that subcategory had EPA been aware of those factors or taken them into account during the national rulemaking process.

5. In a petition for review filed in the United States Court of Appeals for the Third Circuit, NRDC challenged the FDF variance provision on two grounds (see Pet. App. A38-A40).[12] First, NRDC argued that because the Clean Water Act does not specifically authorize FDF variances, EPA lacks the

[12] The court of appeals also considered challenges by numerous parties to various aspects of EPA's General Pretreatment Regulations, 43 Fed. Reg. 27736 (1978), as amended, 46 Fed. Reg. 9404 (1981), and to EPA's categorical pretreatment standards for existing electroplating sources, 44 Fed. Reg. 52590 (1979), as amended, 46 Fed. Reg. 9462 (1981).

authority to grant them (*id.* at A38-A39). Second, NRDC contended (*id.* at A40) that Section 301(*l*) of the Act, 33 U.S.C. 1311(*l*), which was added to the statute in 1977, specifically prohibits such variances insofar as they apply to toxic pollutants. Section 301(*l*) provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list."

In response to NRDC's first argument, EPA contended (Pet. App. A39) that the statute accords the Administrator the discretion to adjust national standards for particular plants. EPA relied on *duPont*, in which this Court held (see 430 U.S. at 128) that EPA may establish nationally binding BPT effluent limitations guidelines provided that variances are available for individual plants. With respect to NRDC's second argument, EPA argued (Pet. App. A41) that Section 301(*l*) was not intended to bar the Agency's longstanding practice of granting FDF variances but was instead meant only to prohibit those modifications authorized by Section 301(c) and (g) of the Act, 33 U.S.C. 1311(c) and (g), which allow modifications of BAT requirements based, respectively, on a facility's inability to afford installation of the required control technology and the high quality of the waters into which the discharge will be made.

6. The court of appeals held that Section 301(*l*) prohibits the granting of FDF variances for toxic pollutants (Pet. App. A36-A43). The court rejected (Pet. App. A39) EPA's contention that this Court's decision in *duPont* supported EPA's authority to grant FDF variances from pretreatment standards. The court also rejected EPA's contention that FDF

variances are not the type of "modifications" that Section 301(*l*) was intended to prohibit (Pet. App. A42-A43). While acknowledging that "[t]he legislative history of Section 301(*l*) does indicate that Congress was primarily concerned with prohibiting modifications under Section 301(c) and (g)," the court concluded (Pet. App. A42 (footnote omitted)) that Congress did not "use[] 'modification' as a term of art so as to exclude variance provisions from the proscription of section 301(*l*)." The court also perceived no difference between "the policy behind FDF variances" and "the policies behind the 'modification' provisions" (Pet. App. A42). The court found it "difficult to imagine" why Congress would have intended to prohibit Section 301(*l*) economic affordability modifications but not purportedly "similar" FDF variances (Pet. App. A43).[13]

SUMMARY OF ARGUMENT

I

Under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Administrator of the Environmental Protection Agency was given the responsibility of issuing regulations establishing limitations on the discharge of pollutants by industrial facilities. By statute and judicial decree, demanding timetables for the promulgation of these requirements have been set.

In discharging these responsibilities, the EPA first confronted the task of establishing limitations for "direct" dischargers—plants that discharge waste directly into navigable waters. In an effort to issue

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[13] The court recognized (Pet. App. A43) that its reading of Section 301(*l*) directly conflicts with that of the Fourth Circuit in *Appalachian Power Co.* v. *Train*, *supra*.

those requirements as soon as possible, EPA decided to promulgate effluent limitations guidelines for categories of facilities—*e.g.*, all iron and steel mills or all leather tanning plants—and to base those requirements primarily upon data concerning representative or typical plants. Among other things, the agency considered the types and quantities of pollutants in a typical plant's waste water and the effectiveness and cost of various methods of eliminating these pollutants.

Because the categorical regulations were based upon a study of representative plants, EPA realized that its calculations might not be valid for all plants. For example, some plants might produce waste water with different types or quantities of pollutants; the methods of pollutant control employed by most plants might be impractical or ineffective; and the cost of complying with the categorical limitations might differ greatly from the costs considered by the Agency. In order to adapt the categorical limitations to these plants, EPA developed the practice of granting variances to those facilities able to demonstrate that they faced factors fundamentally different from those that the agency had considered in framing the categorical standards. EPA called these "fundamentally different factors" or "FDF" variances.

An FDF variance is substantively the same as an amendment refining the categorical standard to take into account factors that the Agency did not sufficiently consider in setting that standard in the first place. As this Court has explained (*EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 77-78 (1980)), an FDF "variance is an acknowledgment that the uniform * * * limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a * * * limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete."

In *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), EPA's approach to these problems was sustained. The Court held (*id.* at 128) that EPA has the authority to issue regulations setting effluent limitations for categories of facilities "so long as some allowance is made for variations in individual plants," as EPA had done through its FDF variance provisions. See also *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. at 72.

When the agency turned to the task of setting pretreatment standards for "indirect" dischargers—facilities that discharge their waste water into publicly owned treatment works—EPA followed the same approach previously used for direct dischargers. That approach was not proscribed, in EPA's view, by the enactment in 1977 of Section 301(*l*) of the Act, 33 U.S.C. 1311(*l*), which forbids the EPA to "modify" any effluent limitation or pretreatment standard for a toxic pollutant. EPA has interpreted this provision as affecting, not FDF variances, but those "modifications" authorized by Section 301(c) and (g). Section 301(c) and (g) modifications may be granted based upon a facility's financial weakness or the high quality of the water into which the discharge will be made—factors that obviously would not justify any change in the categorical standard and that accordingly are not grounds for an FDF variance. The court of appeals was mistaken in reading Section 301(*l*) as applying to FDF variances, as well as Section 301(c) and (g) modifications.

II

This case cannot be decided by looking only at the language of Section 301(*l*). There is no denying the fact that an FDF variance "modifies" an effluent limitation or pretreatment standard in the dictionary sense of the word, *i.e.*, it changes or alters those requirements. But construing Section 301(*l*) to prohibit any change or alteration in an effluent limitation or pretreatment standard for a toxic pollutant would bring that provision into conflict with another section of the Clean Water Act and would lead to absurd results that Congress could not have intended. A literalistic interpretation of Section 301(*l*) would prohibit far more than FDF variances for toxic pollutants; it would mean that effluent limitations and pretreatment standards for toxic pollutants, once issued, could never be amended by the Agency. EPA would be powerless to change its rules, even if it discovered an error in its previous analysis, compiled more accurate or more complete data, or found that technological progress had been made.

It is impossible to believe that Congress intended such absurd results. Indeed, Congress has specifically required EPA to "revise" its standards, including those for toxic pollutants, as technology and other factors change. 33 U.S.C. 1317(b)(2). Since EPA is commanded to "revise" but not to "modify" its requirements for toxic substances, it cannot plausibly be argued that the statutory language clearly supports the court of appeals' interpretation.

EPA's interpretation, on the other hand, gives the term "modify" a consistent interpretation in Section 301(c), (g), and (*l*).

III

The court of appeals acknowledged (Pet. App. A42 (footnote omitted)) that "[t]he legislative history * * * does indicate that Congress was primarily concerned with prohibiting modifications under Section 301(c) and (g)." In fact, the only legislative history directly relevant to the question presented here indicates that Section 301(*l*) was intended to affect modifications sought under Section 301(c) and (g). See pages 27-28, *infra*.

In rejecting this interpretation of Section 301(*l*), the court of appeals relied on the fact that Section 301(c) and (g) were described in passing during congressional debate as "variance" provisions. However, just because Section 301(c) and (g), which are affected by Section 301(*l*), were described as "variance" provisions, it obviously does not follow that every other "variance" provision is likewise within Section 301(*l*)'s scope.

IV

Since the statutory language and legislative history provide no clear support for the court of appeals' and respondent's construction of the Act, the only remaining question is whether the agency has adopted "a permissible construction of the statute." *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5 (footnote omitted).

Here, there can be no doubt that the EPA's interpretation was permissible. As already noted, it is inconceivable that Congress intended to prevent EPA from amending its effluent limitations and pretreatment standards for toxic pollutants, and an FDF variance is substantively the same as such an amendment. Both "modify" requirements of Section 301 in

the same way. Since neither the court of appeals nor respondent has questioned EPA's authority to amend its regulations relating to toxic pollutants, it is puzzling why they believe that FDF variances stand on a different footing. To be sure, the procedure for adopting an FDF variance differs from the procedure for amending a rule, but there is no evidence that Section 301(*l*) was at all concerned with such procedural questions. Nor is there reason to believe that the rulemaking procedure is preferable. At all events, if deference to an agency's interpretation of the statute it administers means anything, it surely must mean that the agency is free, in the absence of congressional direction, to choose between these two procedures.

ARGUMENT

THE EPA MAY GRANT "FUNDAMENTALLY DIFFERENT FACTORS" (FDF) VARIANCES FROM PRETREATMENT STANDARDS FOR ALL POLLUTANTS

A. The EPA's Practice of Allowing FDF Variances for Existing Direct and Indirect Dischargers Constitutes a Reasonable and Permissible Exercise of Discretion Under the Statute

Although the Clean Water Act does not specifically empower the Environmental Protection Agency to grant FDF variances for either direct or indirect dischargers, the EPA is clearly authorized to do so, as this Court's decisions in *duPont* and *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 72 (1980), established. The FDF variance provision for existing indirect dischargers was first promulgated in 1978, but its roots lie in EPA's regulatory program for direct dischargers, on which the pretreatment effort is

patterned. See pages 8-9, *supra*. In *duPont*, this Court upheld EPA's authority to establish binding BPT and BAT effluent limitations for categories of existing direct dischargers, "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations" (430 U.S. at 128 (footnote omitted)). In *National Crushed Stone Ass'n*, the Court reiterated (449 U.S. at 72):

> No * * * explicit variance provision exists with respect to BPT standards, but in *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), we indicated that a variance provision was a necessary aspect of BPT limitations applicable by regulations to classes and categories of point sources. *Id.*, at 128.

What the Court said in these cases about FDF variances for direct dischargers applies equally to FDF variances for indirect dischargers.

The factors that make the FDF variance provision appropriate in the direct discharger context are no less applicable in the case of indirect dischargers. As noted, regulations for both types of dischargers must be developed under stringent timetables. During this period, the Agency is required to collect and analyze large amounts of technical information concerning complex industrial categories. The possibility that EPA might overlook or fail adequately to consider unique factors applicable to a few atypical plants during the categorical rulemaking process is just as likely in the indirect discharger context as in the direct discharger context. It is thus equally important that the Agency's nationally binding categorical pretreatment standards for indirect dischargers be tempered with the flexibility that the FDF variance mechanism offers.

Both the court below and respondents have attempted to distinguish *duPont* on specious grounds. Both argue (Pet. App. A39; Br. in Opp. 6-7) that *duPont* sanctioned FDF variances only in the case of BPT limitations and that variances are appropriate in that context only because BPT limitations are described by statute as applicable to individual "point sources" (33 U.S.C. 1311(b)(1)(A)). Since pretreatment standards for indirect dischargers are described as applicable to "categories of sources" (33 U.S.C. 1317(b)(3)), it is argued that *duPont* does not support the granting of FDF variances to indirect dischargers. Respondent amplifies this argument (Br. in Opp. 6-7) by noting that in *duPont* the Court agreed with EPA (430 U.S. at 137-139) that FDF variances may not be granted in the case of "new source" standards for direct dischargers, which are described as applicable to "categories of sources" (33 U.S.C. 1316(b)(3)). Since this language is similar to that employed in describing the pretreatment standards, respondent deduces that FDF variances may not be granted to indirect dischargers.

The court of appeals' and respondents' analysis is plainly flawed. In the first place, *duPont* sanctioned FDF variances from BAT, as well as BPT, limitations, and BAT limitations apply to "categories and classes of point sources" (33 U.S.C. 1311(b)(2)(A)). The Court stated (430 U.S. at 128 (footnote omitted)):

> We conclude that the statute authorizes the 1977 [*i.e.*, BPT] limitations as well as the 1983 [14]

[14] When *duPont* was decided, the Act required compliance with BAT standards by July 1, 1983. 33 U.S.C. (1976 ed.) 1311(b)(2)(A). See 430 U.S. at 118 n.5. Later in 1977, this date was extended until July 1, 1984. 33 U.S.C. 1311(b)(2)(A).

> [*i.e.*, BAT] limitations to be set by regulation, as long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 [*i.e.*, BPT] limitations.

Moreover, the essence of the court of appeals' and respondent's argument—that Congress intended for BPT limitations to be set on a more individualized basis than BAT limitations or pretreatment standards—is contrary to *duPont's* reasoning. In *duPont*, the Court upheld EPA's authority to issue regulations establishing effluent limitations for classes of plants and rejected the argument that those limitations could only be set in individual permits. The Court first concluded (430 U.S. at 126-127) that the BAT limitations may be set on a categorical basis. The Court then turned (*id.* at 127) to the difference in the statutory language used to describe the BPT and BAT limitations. The Court held (*id.* at 127-128), however, that the BPT limitations could also be set by regulation. The Court noted (*id.* at 127) that "[n]othing elsewhere in the Act * * * suggests any radical difference in the mechanism used to impose limitations for the [BPT] and [BAT] deadlines." The argument upon which the court of appeals and respondent rely flies in the face of this reasoning.[15]

[15] Respondent's reliance upon this difference in the statutory language is all the more unconvincing in light of respondent's insistence for more than a decade that BPT direct discharger requirements be set for industrial categories of sources, just like BAT direct discharger requirements, new source performance standards, and pretreatment standards. See *NRDC* v. *Train*, 6 Env't Rep. Cas. (BNA) 1033 (D.D.C.

The court of appeals' interpretation of the statute also proves more than that Court was willing to accept or acknowledge, for it means that *no* FDF variances may be granted to indirect dischargers, not just that variances may not be granted for toxic pollutants. Respondent, by analogizing pretreatment standards to new source standards (from which FDF variances have never been granted [16]), points up this conclusion. However, not only is this conclusion inconsistent with *duPont*, for the reasons stated, but the analogy between *new source* standards and pretreatment standards applicable to *all indirect dischargers*, including those already in existence prior to the issuance of the standards, is obviously invalid. Both in the case of

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1973), rev'd in part and remanded in part, 510 F.2d 692 (D.C. Cir. 1974).

Respondent has attempted (Br. in Opp. 6-7) to distinguish pretreatment standards from direct discharger BPT requirements on other grounds, but none of the distinctions is valid.

Respondent notes (Br. in Opp. 6) that a pretreatment standard may require "no discharge." So may a BPT regulation—and many have done so.

Respondent obeerves (Br. in Opp. 6-7) that "it is 'unlawful for *any* owner or operator of *any* source to operate *any* source in violation of' " a pretreatment standard. Section 307(d), 33 U.S.C. 1317(d). However, the same is true with respect to BPT limitations. Once a permit is issued to a direct discharger incorporating a BPT limit, it is illegal for that source to discharge in violation of the permit. Sections 301 and 309 of the Clean Water Act, 33 U.S.C. 1311 and 1319.

[16] Accordingly, the regulation at issue here does not allow FDF variances for new source indirect dischargers. 40 C.F.R. 403.13.

direct and indirect dischargers, new and existing sources are treated differently.[17] FDF variances are not available for new source direct or indirect dischargers because such plants can be planned and constructed so as to meet the national standards. It hardly follows, however, that existing indirect dischargers should be treated in the same way. On the contrary, as previously noted, existing indirect dischargers have just as much need for FDF variances as existing direct dischargers.

In sum, *duPont* and *National Crushed Stone Ass'n* settled the question of EPA's authority to issue FDF variances from categorical effluent standards. The remaining question here is whether Section 301(*l*) of the Act, 33 U.S.C. 1311(*l*), prohibits such variances in the case of toxic pollutants.

B. Section 301(*l*) of the Act Does Not Prohibit FDF Variances From Categorical Pretreatment Standards for Toxic Pollutants

This Court has recognized that the EPA's interpretation of the Clean Water Act is entitled to substantial deference. *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. at 83. See also *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 556 (1980); *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976). To sustain the Agency's position, a court need not "go[] so far as to hold that * * * [EPA's] construction of the Act was the only one it permissibly could have adopted." *Train* v. *NRDC*, 421 U.S. 60, 75 (1975) (Clean Air Act). Instead, a court must find only that EPA's construc-

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[17] For direct dischargers, compare 33 U.S.C. 1311(b)(1) and (2) with 33 U.S.C. 1316. For indirect dischargers, compare 33 U.S.C. 1317(b) with 33 U.S.C. 1317(c).

tion of this "complex statute" is "sufficiently reasonable to preclude the [court] from substituting its judgment for that of the Agency" (*id.* at 87). See also *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-7. Under this standard, EPA's interpretation of Section 301(*l*) of the Act, 33 U.S.C. 1311(*l*), clearly should have been sustained.

1. *The Language of Section 301(l) does not support the court of appeals' interpretation*

The court of appeals held that the language of Section 301 (*l*) clearly prohibits FDF variances (Pet. App. A42),[18] and it cannot be denied that on first reading the statutory language appears to support the Third Circuit's analysis. Section 301(*l*) provides that the "Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list." A national categorical pretreatment standard is unquestionably a "requirement" of Section 301(b)(1)(A)(ii), 33 U.S.C. 1311(b)(1)(A)(ii), and an FDF variance "modifies" such a standard in the dictionary sense of the word, *i.e.*, it changes or alters it. See *Webster's Third New International Dictionary* 1452 (1976). Thus, if we go no further, the Third Circuit's decision seems correct.

This Court, however, does not " 'make a fortress out of the dictionary' " and has therefore "consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended con-

[18] By contrast, the Fourth Circuit found the language of Section 301(*l*) to be unclear and therefore deferred to the EPA's reasonable construction. *Appalachian Power Co.* v. *Train*, 620 F.2d at 1044-1048.

texts." *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 764 (1949) (footnote omitted); see also *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981). The problem with a literalistic interpretation of Section 301(*l*) is that it conflicts with other provisions of the Act and would lead to unreasonable results that Congress could not have intended. Under this interpretation, a limitation or standard for a toxic pollutant, once promulgated by EPA, could never be changed by the Agency for any reason, because any such change would be a proscribed "modification." Neither the discovery of an error in the Agency's previous analysis, the compilation of better or more accurate data, or subsequent scientific developments would allow the Agency to change the standard. Not only would FDF variances be prohibited, but administrative amendment or repeal of the standard would likewise be precluded. Unless Congress acted, the standard would remain unchanged.

It seems clear that Congress did not intend such results. Having entrusted the EPA with the responsibility for issuing requirements regarding toxic pollutants in the first place, Congress could not have wanted to prevent the Agency from altering those requirements after promulgation, as circumstances warrant. Indeed, far from precluding such alteration, in Section 307(b)(2), 33 U.S.C. 1317(b)(2), Congress provided that the EPA must "revise" its pretreatment standards, including those for toxic pollutants (see 33 U.S.C. 1317(b)(1)), "from time to time, as control technology, processes, operating methods, or other alternatives change." In our view, a statute that commands EPA to "revise" pretreatment standards for toxic pollutants but not to "modify" them is not "clear"on its face, as the court below

believed (Pet. App. A42) and as respondent maintains (Br. in Opp. 11).

If Section 301(*l*) does not prohibit all "modifications" in the literal sense, the question is which changes are allowed and which are proscribed. EPA's position has always been that Section 301(*l*) prohibits, in the case of toxic pollutants, those statutory modifications that are otherwise allowed under Section 301(c) and (g). As this Court has noted (*EPA* v. *National Crushed Stone Ass'n*, 449 U.S. at 71-72 (footnote omitted)):

> A variance under § 301(c) may be obtained upon a showing "that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Thus, the economic ability of the individual operator to meet the costs of effluent reductions may in some circumstances justify granting a variance from the 1987 limitations.

Under Section 301(g), the BAT limitations for any non-toxic pollutants may be modified based upon the quality of the water into which the discharge will be made.

EPA's construction is supported by the fact that the identical term—"modification"—is used in Section 301(c), (g) and (*l*). It is, of course, a canon of statutory interpretation that a term is presumed to have the same meaning in different portions of the same statute. *Bankamerica Corp.* v. *United States*, No. 81-1487 (June 8, 1983), slip op. 6-7; *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs*, No. 81-1891

(May 24, 1983), slip op. 9; *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980). EPA's interpretation also finds support in the legislative history. And most important, it gives Section 301(*l*) a reasonable meaning that is consistent with the purpose of that provision.

2. The legislative history of Section 301(l) indicates that Congress did not intend to prohibit FDF variances

Although the court of appeals stated (Pet. App. A43) that the meaning of Section 301(*l*) is "clear," the court looked beyond the language of the statute to the legislative history. However, instead of supporting the court of appeals' construction of the Act, the legislative history of the 1977 amendments buttresses EPA's view that Section 301(*l*)'s proscription was not directed to FDF variances. In accordance with EPA's interpretation, the legislative history indicates that Congress was focusing on the statutory modifications explicitly authorized by Section 301(c) and (g). Representative Roberts, the House floor manager of the Act, stated with regard to the Conference Committee bill:

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *Legislative History of the Clean Water Act of 1977*, at 328-329 (1978) [hereinafter

Leg Hist.].[19] Similarly, Senator Muskie, the Act's primary author and then Chairman of the Senate Committee on Environment and Public Works, directed his attention to Section 301(c) and (g) modifications without mentioning the FDF variance provision. *Leg. Hist.* 458, 461.

The court below reviewed this legislative history and agreed with EPA that it "does indicate that Congress was primarily concerned with prohibiting modifications under section 301(c) and (g)" (Pet. App. A42 (footnote omitted)). But relying (*ibid.*) on the fact that supporters of the 1977 amendments at times referred to Section 301(c) and (g) as "waiver" or "variance" provisions, the court found (Pet. App. A42) that Congress did not appear to have "used 'modification' as a term of art so as to exclude variance provisions from the proscription of section 301(*l*)." However, those references shed little light on the meaning of that provision. Just because Section 301(c) was described in passing during floor debate as a "variance" provision, it cannot be inferred, as the court of appeals apparently did (Pet. App. A42), that Congress intended for Section 301 (*l*) to apply to every "variance" provision. The court of appeals was guilty of bad logic and of ignoring the realities of the legislative process.

A far more telling feature of the legislative history is the absence of any indication that Congress intended to alter EPA's well-established and well-known practice of granting FDF variances. EPA had included FDF variance provisions in numerous BPT

[19] Congressman Roberts went on to note that, in contrast, certain pollutants not listed as toxic, known as nonconventional pollutants, "will be subject to waivers under section 301(c) * * * and section 301(g) * * *." *Leg. Hist.* 331.

regulations prior to the 1977 statutory amendments.[20] Similarly, in *duPont*, which was handed down while the 1977 amendments were under consideration, this Court stated that variances from BPT and BAT requirements are appropriate (430 U.S. at 128). Surely, had Congress intended to alter the Agency's practice of authorizing FDF variances, or to legislatively reverse *duPont*, Congress would have made that intention clear, just as it expressed its intention to limit the availability of Section 301(c) and (g) modifications. But no member of Congress, including the bill's leading sponsors in the House and Senate, expressed such an intent. In the absence of an express indication of an intent to overrule this preexisting law, the Third Circuit erred in ascribing such an intent to Congress. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979).

Respondent has taken issue with this argument on several grounds. First, respondent has asserted (Br. in Opp. 12) that Congress had no reason to refer to FDF variances because relatively few dischargers had applied for variances from BPT requirements by 1977. But irrespective of the number of the applicants, it is clear that by 1977 the FDF variance was a well-entrenched feature of EPA practice that could not have escaped Congress's notice. Not only did BPT regulations routinely contain a provision allowing such variances but, as noted, FDF variances had been prominently discussed in *duPont*.

Respondent also contends (Br. in Opp. 12) that in 1977 Congress had no need to address this Court's opinion in *duPont* because the BAT regulations involved in that case did not include an FDF variance provision and the focus of the 1977 amendments was

[20] See, *e.g.*, 40 C.F.R. 415.62 (1976).

on strengthening EPA's authority to regulate toxic pollutants, primarily through the vehicle of BAT regulations. However, the *BPT* regulations at issue in *duPont did* contain an FDF variance clause, and those regulations applied to pollutants that Congress, in the 1977 amendments, declared to be toxic.[21] In addition, in February 1977, prior to the enactment of the 1977 amendments, EPA had granted an FDF variance from national BPT regulations to a steam electric generating plant for copper, a toxic pollutant.[22] Since Congress's main concern in 1977 was toxic pollutants, the legislative history would have surely contained some reference to or criticism of *duPont* if Congress had intended to prohibit FDF variances for toxic pollutants. As noted, however, the legislative history is devoid of any such reference.

Finally, respondent has argued (Br. in Opp. 11) that the courts may not infer a nonstatutory exception, such as the FDF variance, where Congress has provided specific statutory exceptions, such as Section 301(c) and (g). This contention is flatly inconsistent with *duPont*, which upheld the nonstatutory FDF variance mechanism even though Section 301(c) was already part of the statute.

3. *EPA's interpretation of Section 301(l) gives that provision its most reasonable meaning and is fully consistent with the purpose of that provision*

a. Apart from its mistaken reading of the legislative history, the only other basis for the court of appeals' decision was its erroneous belief that Section

[21] See, *e.g.*, 40 C.F.R. 415.62 and 415.172 (1976).

[22] Final Decision of the Administrator FDF 76-08, Southern California Edison Co. Huntington Beach Generating Station, NPDES Permit No. CA0001163 (Feb. 22, 1977).

301(c) modifications "serve the same function" as FDF variances (Pet. App. A42). On that premise, the court concluded (*id.* at A43) that "[i]f Congress was willing to prohibit section 301(c) modifications where toxic pollutants are concerned, it is difficult to imagine why Congress would have permitted similar FDF variances for those same pollutants."

The court of appeals' analysis betrays a fundamental misunderstanding of the nature of both FDF variances and Section 301(c) modifications. An FDF variance is substantively the same as an amendment of the regulation establishing the effluent limitation or pretreatment standard. As this Court has written, an FDF variance "is an acknowledgment that the uniform * * * limitation was set without reference to the full range of [factors], to which the Administrator was to refer. Insofar as a [categorical] limitation was determined without consideration of a [factor] fundamentally different from those that were considered by the Administrator, that limitation is incomplete." *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. at 77-78. In effect, the FDF variance creates an appropriate subcategory for the plant or plants in question, a category that should have been established at the outset had EPA been aware of all the relevant factors and taken them into account. In considering whether an FDF variance will be granted, EPA cannot take into account factors that could not have justified a change in the national regulation, such as the economic plight of the affected plant or plants (40 C.F.R. 403.13(e)(3)) or "the impact of a [d]ischarge on the quality of the POTW's receiving waters" (40 C.F.R. 403.13(e)(4); see also *Crown Simpson Pulp Co.* v. *Costle*, 642 F.2d 323 (9th Cir.), cert. denied, 454 U.S. 1053 (1981)).

A modification under Section 301(c), by contrast, serves an entirely different purpose.[23] A Section 301 (c) modification requires a showing that the "modified requirements * * * will represent the maximum use of technology *within the economic capability of the owner or operator*" (33 U.S.C. 1311(c) (emphasis added)). Thus, a Section 301(c) modification excuses compliance with a valid requirement by a direct discharger. Unlike an FDF variance, such a modification is not in any way an acknowledgement that the effluent limitation was incomplete or deficient. As this Court has already explained (*EPA* v. *National Crushed Stone Ass'n*, 449 U.S. at 78):

> A variance based on economic capability * * * would allow a variance simply because the point source could not afford a compliance cost that is not fundamentally different from those the Administrator has already considered * * *. It would force a displacement of calculations already performed, not because those calculations were incomplete or had unexpected effects, but only because the costs happened to fall on one particular operator, rather than on another who might be economically better off.

Similarly, a Section 301(g) modification may be obtained by showing that if the modification is granted, BPT requirements will nevertheless be met; additional requirements for other sources will not result; and public water supplies, the environment, and human health will be protected. Like a Section 301 (c) modification, a modification under Section 301(g)

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[23] Modifications under Section 301(c) and (g) are not available for indirect dischargers. Under the statute, they are only available for direct dischargers.

does not suggest that the direct discharger's effluent limitation was inaccurate or incomplete.[24]

In short, the court of appeals' equation of FDF variances with Section 301(c) and (g) modifications is simply wrong.[25]

b. Once the fundamental difference between an FDF variance and a statutory modification is recognized, the soundness of the EPA's interpretation becomes apparent. While a literalistic reading of Section 301(*l*) would prevent EPA from ever changing a standard relating to a toxic pollutant—an unreasonable result that Congress could not have intended —EPA's interpretation leaves the Agency free to

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[24] By its terms, Section 301(g), which was enacted in 1977 together with Section 301(*l*), does not permit a "modification" for toxic pollutants. Thus, the primary purpose of Section 301(*l*) appears to have been to preclude Section 301(c) modifications for toxic pollutants.

[25] In concluding (Pet. App. A42) that Section 301(c) modifications and FDF variances "serve the same function," the court of appeals relied on the following statement in *National Crushed Stone Ass'n*, 449 U.S. at 74:

> A § 301(c) variance * * * creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class.

This statement, however, makes no reference whatever to FDF variances from either BPT or BAT standards. The Court was merely pointing out that a Section 301(c) modification results in a standard that is within the economic capability of the discharger. It does not follow, however, as the court of appeals concluded (Pet. App. A42), that this Court viewed Section 301(c) modifications and FDF variances as "serv[ing] the same function." On the contrary, later in *National Crushed Stone Ass'n* (449 U.S. at 77-78), this Court took pains to point out the significant differences between these two measures.

change the categorical standard by amendment or FDF variance, if warranted. But EPA's interpretation also means that compliance with a valid categorical standard for a toxic pollutant may never be excused due to the economic plight of a particular plant or the quality of the receiving waters; elimination of toxic pollutants must take precedence over such considerations. This interpretation is entirely consistent with the 1977 amendments' emphasis on restricting the discharge of toxic pollutants. *Leg. Hist.* 326, 454.

c. Respondent has argued (Br. in Opp. 13) that while EPA may not grant FDF variances for toxic pollutants, EPA may "revise" its limitations and standards for such pollutants through informal rulemaking procedures. While contending (Br. in Opp. 11) that FDF variances are "clear[ly]" "modifications" proscribed by Section 301(*l*), respondent does not explain why the revisions it espouses are any less "modifications."

Respondent has also conceded throughout this litigation that EPA has the flexibility to establish plant-specific requirements by creating tailor-made subcategories during the national rulemaking process. However, respondent has offered no convincing argument why it is a reasonable construction of the Act to allow the creation of such subcategories during the initial rulemaking but unreasonable to accord EPA the same flexibility through the FDF variance process in those relatively few cases in which a discharger can demonstrate that EPA has not adequately considered some factor during the rulemaking process.[26]

[26] Respondent has offered various arguments on this point over the course of this litigation, but none is well founded. In the court below, respondent contended that the FDF variance process circumvents the public notice and comment requirements attendant to national rulemakings. Transcript of Oral Argument in Court of Appeals at 249. However, the FDF variance process clearly provides for public notice and comment. 40 C.F.R. 403.13(j). In opposing the petitions for certiorari, respondent argued that the FDF variance procedure entails several layers of review and public comment and is thus "extraordinarily slow of resolution" (Br. in Opp. 13). However, the review procedures about which respondent complains help to ensure that FDF variances will only be granted in the relatively few appropriate cases. Respondent's claim (Br. in Opp. 14) that FDF variance applications permit companies to delay compliance with the Act is inconsistent with respondent's assertion (Br. in Opp. 7) that "[f]ew companies are interested in the FDF variance." Finally, respondent has argued that Section 307(b)(2) of the Act, 33 U.S.C. ~~(1976 ed.)~~ 1317(b)(2), contains the exclusive statutory mechanism for correcting the national pretreatment standards. That section directs EPA, "from time to time," to revise the standards "as control technology, processes, operating methods, or other alternatives change." Clearly, however, this provision is intended to reflect periodic changes in the industry, not to adjust the national standards in light of preexisting factors not considered by EPA at the time of promulgation.

Moreover, since respondent agrees that EPA may adopt rules creating special categories for plants with fundamentally different factors and that EPA may amend its rules setting requirements for toxic pollutants, respondent would appear to concede by implication that EPA, after issuing categorical requirements relating to toxic pollutants, may revise those requirements to take into account the fundamentally different factors affecting a particular plant or group of plants.[27] Such an amendment, of course, would be

[27] Following the decision in this case, EPA announced that it would entertain petitions for amended rulemaking by certain indirect dischargers who were previously eligible for FDF variances. See 48 Fed. Reg. 52396 (1983). EPA explained (*ibid.*) that in such cases "it may be appropriate to

substantively indistinguishable from an FDF variance. Thus respondent's disagreement with the Agency appears to concern, not the result achieved when an FDF variance is granted for a toxic pollutant, but the procedure employed. There is however, no evidence that Section 301(*l*) was concerned with such procedural questions. Furthermore, respondent has never provided a cogent or consistent explanation of why the rulemaking procedure it favors is preferable. Respondent has argued, alternatively, that the FDF variance procedure is too summary and too slow. See note 25, *supra*. At all events, if deference to EPA's construction of the Clean Water Act means anything, it surely must mean that the Agency is free to choose between these two procedures. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

d. FDF variances are granted infrequently[28] and present no threat to the achievement of the Clean Water Act's goal of improving the quality of the nation's waters through national regulation.[29] The

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issue specific categorical standards for such facilities, treating them as a separate subcategory with more, or less, stringent standards as appropriate."

[28] As respondent itself acknowledges (Br. in Opp. 12), by 1977 only 50 of 4,000 major industrial dischargers covered by BPT limits had applied for FDF variances, and only two variances had been granted. As of today, only four variances have been granted to direct dischargers, and none has yet been granted to an indirect discharger. The Agency estimates that approximately 40 FDF variance requests have been filed by indirect dischargers and are pending.

[29] See *Crown Simpson Pulp Co.* v. *Costle*, 642 F.2d 323 (9th Cir.), cert. denied, 454 U.S. 1053 (1981) (upholding EPA's veto of FDF variances from BPT requirements that had been granted by the State based upon lack of harm to receiving waters).

small number of variances obtained, however, does not mean that such variances are unimportant or unnecessary. There are at least 60,000 existing indirect dischargers potentially subject to national pretreatment standards. Within the past several years, EPA has promulgated BAT-level pretreatment standards for 17 industrial categories, and it is now moving rapidly toward completion of BAT-level requirements for an additional seven categories within the next year. All of these regulations were or are being developed under the very rationale that this Court found persuasive in *duPont*, *i.e.*, that it is sound administrative practice to promulgate categorical regulations for existing dischargers as soon as possible with an FDF variance available as a safety valve. In light of the stringent deadlines that have been imposed on the Agency, EPA has found it necessary to base the national standards on the more typical plants and to focus on unique situations through the FDF variance process. In the past, the FDF variance mechanism has helped to protect the national standards against challenges by plants with unique circumstances.[30] If FDF variances for toxic pollutants may not be granted, then existing regulations may be more vulnerable in the future. And issuance of standards now under development by the Agency may be delayed if EPA must account for all

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[30] See, *e.g.*, *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979) (rejecting challenge to BPT effluent limitations guidelines for ore mining direct dischargers because FDF variance procedure was available to address unique plant); *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1040-1041 (D.C. Cir. 1978) (finding existence of FDF variance "crucial" to affirmance of BPT regulations for direct dischargers); *American Iron & Steel Institute* v. *EPA*, 526 F.2d 1027, 1061 (1975), modified, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978).

unique plant-specific factors in developing these standards.

In sum, the FDF variance provision is a longstanding and integral feature of the EPA's categorical rulemaking activities for direct and indirect dischargers. It provides an important, albeit limited, safety valve for atypical plants that are improperly regulated by the initial rule. There is no sound basis for disturbing EPA's construction of the Act which allows such variances to be granted for all pollutants. Upsetting EPA's interpretation at this late juncture could inject considerable uncertainty into the implementation of the Act and could thwart the achievement of its goals.

CONCLUSION

The judgment of the court of appeals should be reversed.

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IN THE

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OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Respondent;

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Third Circuit correctly held that Section 301(*l*) of the Clean Water Act, 33 U.S.C. (Supp. V) 1311(*l*), prohibits the Environmental Protection Agency from granting variances from national pretreatment standards for toxic pollutants.

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A96)[1] is reported at 719 F.2d 624.

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[1] "Pet. App." refers to the appendix to the petition in No. 83-1013. "Br. in Opp. App." refers to the appendix to the brief in opposition to the petitions.

STATUTES AND REGULATION INVOLVED

Pertinent provisions of the Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, are set forth in Pet. App. A116-A121 or the Appendix to this brief. The "fundamentally different factors" (FDF) variance provision, 40 C.F.R. 403.13, is reproduced at Pet. App. A122-A127.

STATEMENT OF THE CASE

The Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, directs EPA to control two types of industrial polluters: (1) "direct" dischargers, which dump their waste water directly into navigable waters, and (2) "indirect" dischargers, which dump their waste water into municipal sewage treatment plants which, in turn, discharge to navigable waters.

When the law was first enacted, Congress required direct dischargers to meet two progressively more stringent technology-based requirements: "best practicable control technology currently available" (BPT) by July 1, 1977, and "best available technology economically achievable" (BAT) by July 1, 1983 (later amended to July 1, 1984). 33 U.S.C. (& Supp. V) 1311(b)(1)(A) and (b)(2)(A) and (C). Indirect dischargers had no more than three years from the date of promulgation to meet "pretreatment standards" designed to prevent discharges of pollutants which harmed the environment or the sewage treatment plant. 33 U.S.C. (& Supp. V) 1311(b)(1)(A) and (2)(A) and 1317(b). Pretreatment standards, too, were technology-based.[2]

BPT, BAT, and pretreatment were each integral to the overall scheme to clean up the nation's waters, but the pretreatment standards were especially important. Because municipal sewage plants are ordinarily not designed to treat industrial waste water, the pretreatment standards served a dual function. Like BPT and BAT limits, they prevented untreated or inadequately treated industrial wastes from entering waterways and drinking water supplies. In addition, unlike BPT or BAT limits, they protected the nation's multi-billion dollar investment in municipal sewage treatment plants. *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Cong. Research Service, Comm. Print No. 1, 93rd Cong., 1st Sess. 800, 1479 (1973)[hereinafter cited as 1972 *Legis. Hist.*].

[2] The Act did not initially tell EPA how to set pretreatment standards. EPA adopted a technology-based approach to pretreatment in response to a lawsuit filed by NRDC. Congress later ratified this approach. See discussion, p. 5, *infra*.

For example, the pretreatment standards were intended to stop highly damaging industrial chemicals from interfering with sewage treatment plant performance, as happened in Louisville, Kentucky where the sewer system exploded from industrial contaminants, according to EPA. Transcript of Oral Argument in Court of Appeals at 271. The pretreatment standards also were supposed to prevent toxic industrial pollutants from contaminating sewage treatment plant sludge, which, if laden with toxics, limits a municipality to expensive or environmentally troublesome sludge disposal options. *A Legislative History of the Clean Water Act of 1977*, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2nd Sess. 690 (1978) [hereinafter cited as 1977 *Legis. Hist.*]. Kokomo, Indiana illustrates the point; that city's sludge became so toxic with electroplating wastes that the state, according to EPA, declared the sludge a hazardous waste. Transcript of Oral Argument in Court of Appeals at 271. Thus, Congress put EPA on an even faster schedule for setting pretreatment than for BPT and BAT requirements.[3] It told EPA to use the pretreatment standards "to prevent, to the maximum extent feasible, the industrial pollutants from entering the [municipal sewage treatment] plant in the first place." 1977 *Legis. Hist.*, *supra*, at 690.

From 1972 to 1977, EPA issued a series of BPT, BAT, and pretreatment requirements. Most of its BPT limits included a provision authorizing variances for those sources

[3] For example, Congress gave EPA one year to issue guidelines for developing BPT and BAT, but only 120 days to do so for pretreatment. In addition, EPA had only 180 days from enactment to propose, and 90 more days to publish, pretreatment standards. Cf. Section 304(b)(1) and (2), 33 U.S.C. 1314(b)(1) and (2), with Sections 304(f)(1) and 307(b)(1), 33 U.S.C. 1314(f)(1) and 1317(b)(1).

which were "fundamentally different" (in terms of the factors relevant to BPT) from the sources in EPA's data base. The pretreatment and BAT limits did not include such a variance.

EPA's initial round of standard-setting led to substantial litigation. The technological issues were, indeed, complex, but EPA by its own admission failed to devote adequate resources to the task and lacked a reservoir of industry-oriented expertise in its infant regulatory program. *Id.* at 1463. The result, in the eyes of Congressional investigating staff, was "uneven performance." *Id.* at 335.

In addition, significant questions of statutory interpretation arose. This Court resolved one such issue, upholding EPA's authority to issue industry-wide regulations for BPT and BAT against an industry challenge in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). *DuPont* held that Congress clearly contemplated national rules for BAT, which, by its terms, applied to "categories and classes" of sources. *DuPont* also held that the law authorized national regulations for BPT, even though the statute, which spoke of individual "point sources" rather than categories and classes of sources, was not as clear on this point. The Court, however, held that the "fundamentally different factors" or "FDF" variance clause in EPA's BPT rules made the rules sufficiently flexible for individual point sources. *Id.* at 126-128. *DuPont* did not address variances from the Act's BAT or pretreatment requirements; it did, however, hold that EPA could not create variances which were not authorized by statute from the Act's new source standards. *Id.* at 137-139.

In 1977, shortly after *duPont*, Congress took stock of the law. It found that progress in controlling conventional pollutants, the principal targets of BPT requirements, had been greater than anticipated, notwithstanding the challenges to EPA's regulations. 1977 *Legis. Hist.*, *supra*, at 330. It therefore eased future control requirements for conventional pollutants.[4]

[4] In Sections 301(b)(2)(E) and 304(b)(4) of the Act, 33 U.S.C. (Supp. V) 1311(b)(2)(E) and 1314(b)(4), Congress created a new technology-based requirement, "best conventional pollution control technology." This new requirement would be at least equal to BPT, but possibly not as stringent as BAT. 1977 *Legis. Hist.*, *supra*, at 427-428.

At the same time, Congress conceded that the principal regulatory mechanism for control of toxics had failed. 1977 *Legis. Hist.*, *supra*, at 326-327. Alarmed by mounting evidence of the seriousness and ubiquity of these pollutants, Congress ordered a "major redirection and refinement" of EPA's regulatory program to focus control on toxics. *Id.* at 326-327, 454-455, 862-865. First, Congress elevated the importance of pretreatment and BAT requirements. It directed EPA to use these requirements to control toxics, essentially codifying a settlement agreement[5] formulated by NRDC and EPA. *Id.* at 455. This agreement required EPA to upgrade BAT, pretreatment, and new source standards to include specific limits on 65 toxic compounds in 21 industrial categories. *Id.* at 336.

Second, Congress enacted several amendments strengthening the pretreatment program.[6] It reaffirmed the technology-forcing aspects of pretreatment standards, repeatedly emphasizing that these standards should reflect technology comparable to BAT for direct dischargers. *Id.* at 271, 342, 403, 461, 690.

Finally, Congress defined when, and under what conditions, sources could obtain variances from BAT and pretreatment requirements. It cut back on the economic capability variance in the 1972 law, eliminating its use for toxic pollutants.[7] It created a new "safety valve" to give flexibility to BAT limitations, again prohibiting its use for toxics.[8] It did not create any variances from pretreatment standards, but it did allow indirect dischargers to get a "credit" for removal occurring at the municipal sewage treatment plant, in effect splitting the pollution control between the indirect discharger

[5] *NRDC* v. *Train*, 8 Env't. Rep. Cas. (BNA) 2120 (D.D.C. 1976), modified *sub nom. NRDC* v. *Costle*, 12 Env't. Rep. Cas. (BNA) 1833 (D.D.C. 1979), modified *sub nom. NRDC* v. *Gorsuch*, Nos. 2153-73, *et al.* (D.D.C. Oct. 26, 1982), modified *sub nom. NRDC* v. *Ruckelshaus*, Nos. 2153-73, *et al.* (D.D.C. Aug. 2, 1983 and Jan. 6, 1984).

[6] *E.g.*, Congress gave EPA direct enforcement authority against non-complying indirect dischargers and enhanced the ability of pretreatment standards to protect sludge quality. 1977 *Legis. Hist.*, *supra*, at 690.

[7] Section 301(c), 33 U.S.C. 1311(c); 1977 *Legis. Hist.*, *supra*, at 328.

[8] Section 301(g), 33 U.S.C. (Supp. V) 1311(g); 1977 *Legis. Hist.*, *supra*, at 674-675.

and the sewage treatment plant.[9] Simultaneously, it enacted Section 301(*l*), 33 U.S.C. (Supp. V) 1311(*l*), which said: "The Administrator may not modify any requirement of this section as it applies to any [toxic] pollutant ***."[10] It stressed that EPA could only grant variances for non-toxic pollutants, and urged EPA to err on the side of caution in applying this mandate.[11]

Six months later, EPA issued pretreatment regulations which, unlike its pre-1977 pretreatment standards, contained an FDF variance provision covering all pollutants, including toxics. 40 C.F.R. 403.13(Pet. App. A122).[12] EPA explained that this variance could be used for information which "will not be available or, for other reasons, will not be considered" during standard-setting. 40 C.F.R. 403.13(b). Neither the rule nor the accompanying preamble made any reference to Section 301(*l*). NRDC promptly challenged the variance.

One year later, EPA issued BAT rules which, for the first time, contained a similar variance provision. 44 Fed. Reg. 32854, 32893-32894 (June 7, 1979). Again, EPA made no mention of Section 301(*l*). Again, NRDC sued. This suit is still pending in the D.C. Circuit.[13]

NRDC raised two arguments below. First, it contended that all FDF variances from pretreatment standards were illegal; they were not authorized by statute any more than the new source variance invalidated in *duPont*. Second, NRDC

[9] Section 307(b), 33 U.S.C. (Supp. V) 1317(b); 1977 *Legis. Hist.*, *supra*, at 271-272.

[10] Congress listed the toxic pollutants covered by Section 301(*l*), incorporating the list developed by NRDC and EPA in the Consent Decree, n. 5, *supra*. EPA had authority to revise the list. Section 307(a)(1), 33 U.S.C. (Supp. V) 1317(a)(1).

[11] *E.g.*, "[T]he bill prohibits variances for [toxic] pollutants ***. The committee's intent is to prohibit both those pollutants known to be toxic or hazardous and those suspected of being toxic or hazardous." 1977 *Legis. Hist.*, *supra*, at 677.

[12] EPA issued the variance on June 26, 1978, 43 Fed. Reg. 27736-27773, and amended it on January 28, 1981, 46 Fed. Reg. 9404-9460. The 1978 regulations differed in several respects which are not relevant here.

[13] *NRDC, et al.* v. *EPA*, Nos. 80-1607, *et al.*

argued that FDF variances from pretreatment standards for toxics violated the newly-enacted Section 301(*l*).

The Third Circuit declined to address the broader question raised by NRDC's first argument.[14] Instead, it held that EPA's FDF variance clause violated Section 301(*l*). (Pet. App. A36-A43).

SUMMARY OF ARGUMENT

I.

The question before this Court is whether the Third Circuit correctly held that Section 301(*l*) of the Clean Water Act prohibits EPA from granting variances from national pretreatment standards for toxic pollutants. To resolve this question, the Court need not accept petitioners' invitation to decide a broader issue: whether EPA may grant variances from pretreatment standards so long as the variances do not involve toxics [and, hence, do not violate Section 301(*l*)]. The broader issue is not properly presented to this Court because the court of appeals did not reach it.

This case, therefore, does not require this Court to review its decision in *duPont*. The question before the Third Circuit was whether Section 301(*l*), enacted after *duPont*, prohibits FDF variances from pretreatment standards for toxic pollutants. This turns on the meaning of Section 301(*l*), something *duPont* could not address. Therefore, it is not surprising that the Third Circuit's decision does not even address *duPont* in its discussion of Section 301(*l*). (Pet. App. A40-A43). Hence, petitioners' reliance on *duPont* is misplaced.

II.

The Third Circuit held that Section 301(*l*) of the Clean Water Act clearly prohibits variances from pretreatment standards for toxic pollutants. Because EPA's FDF variance allows case-by-case modifications to these very standards, the Third Circuit ruled that EPA's variance flies in the face of Section 301(*l*).

[14] The Third Circuit found it unnecessary to reach this question because it found that EPA had only issued pretreatment standards for toxic pollutants.

Neither petitioner offers a convincing reason for ignoring the statute's plain language. CMA says that the FDF variance is not really a "variance," even though it relaxes uniform, national pollution control requirements for individual sources. CMA's argument distorts the common understanding of the term "variance." EPA takes a different tack. EPA says that the statute is not clear at all, because if Section 301(*l*) is held to prohibit modifications of pollution control requirements, then it must also be read to prohibit EPA from upgrading standards to reflect new developments in technology. This, says EPA, is so absurd a result that EPA is free to develop its own construction of the statute.

EPA's argument fails on two counts. First, the statute—and the legislative history—make it clear that Congress addressed Section 301(*l*) to variances, not periodic improvements in the standards. Thus EPA cannot allow an individual source to get by with less stringent pollution control requirements than others in the same industrial class. It can, however, revise the requirements for all.

Second, EPA's construction of the statute does not square with the Act itself. Section 301(*l*) broadly bans all variances for toxics. EPA cannot narrow its scope to only certain variances [*i.e.*, economic or water quality variances] so that EPA is free to create other variances of its own choosing. Congress wanted a comprehensive ban on variances for toxics; it deliberately restructured Section 301 so that the toxics ban in subsection (*l*) would cover all Section 301 requirements, not just Sections 301(c) and (g) as EPA maintains.

III.

The legislative history confirms that Congress intended to ban all variances for toxic pollutants. There is no legislative history to support EPA's view that Congress banned only certain types of variances, leaving EPA free to create others.

EPA, in effect, says that because Congress did not mention FDF variances, Congress approved them despite Section 301(*l*). EPA's argument is absurd. Congress's primary goal in the 1977 amendments was strict control of toxics. Recognizing that variances could negate the plain thrust of

the amendments, Congress carefully circumscribed EPA's authority to grant variances.

It defies common sense—and ordinary principles of statutory construction, see, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153 (1978)—to believe that Congress simultaneously gave EPA broad authority to create its own variances. Nor did *duPont* give EPA such authority. Thus, EPA's search for Congressional intent to reverse *duPont* is misguided.

More important, EPA had a well-defined practice in 1977 of restricting FDF variances to BPT limits. EPA did not include FDF variances in its pretreatment or BAT standards. If, as EPA maintains, Congress's silence affirmed agency practice, then Congress ratified the absence, not the presence, of FDF variances from pretreatment standards.

IV.

FDF variances for toxic pretreatment standards are not permissible or reasonable. They allow individual sources to escape otherwise applicable national standards, contrary to Congress's intent. It does not matter that EPA tries to restrict the scope of the variance to a reexamination of the statutory factors behind BAT. The statute has its own vehicle for applying BAT factors to individual sources: Section 301(c). Since Section 301(c) variances are not available for toxics, neither are FDF variances.

An FDF variance cannot be passed off as mere subcategorization or revision of a rule. EPA designed the FDF variance for use by a single source "within *** a subcategory." 40 C.F.R. 403.13(b)(Pet. App. A122). FDF variances thus defy Congress's instruction to avoid single plant evaluations in the technology-forcing context of BAT and pretreatment standards. In addition, FDF variances take close to a year or more to resolve. They interfere with the Act's strict compliance deadlines for pretreatment in a way that subcategorization during a rulemaking does not. Finally, the FDF variance is, procedurally, a Rube Goldberg contraption. It wastes EPA's scarce resources and delays compliance with the law. Standard rulemaking (or rule-revising) procedures are simple by comparison.

There are no convincing policy justifications for an FDF variance from pretreatment standards. The variance is not a necessary aspect of pretreatment standards development. It may have served, in a few past cases, to cover agency rulemaking mistakes on BPT limits. But the technology-based regulatory program is long past its infancy. It now has more industry-oriented expertise and more rulemaking experience. It makes no sense for a mature regulatory program to fail to consider information submitted in a rulemaking. Indeed, by doing so, EPA runs the risk that its rules will be overturned in court. It also makes no sense, as a matter of policy, to reward sources which withhold relevant information during a rulemaking with an additional opportunity for relief from otherwise applicable standards.

There are sound policy reasons for prohibiting FDF variances from toxic pretreatment standards. Focusing on atypical plants during the rulemaking could generate information which enhances the technology-forcing nature of the pretreatment standards for an entire industrial class. It will use agency resources more efficiently. It will avoid prolonged uncertainty over pollution control obligations for some plants. It will prevent unqualified applicants from using the variance process to buy time. And it will avoid the competitive inequities inherent in a phased approach to standard-setting within the same industrial category. Thus, the Third Circuit's decision will facilitate, rather than disrupt, implementation of the Act.

ARGUMENT

1. This case turns on the meaning of Section 301(*l*) of the Clean Water Act.

The question before this Court is whether the Third Circuit correctly held that Section 301(*l*) of the Clean Water Act prohibits EPA from granting FDF variances from national pretreatment standards for toxic pollutants. The Third Circuit began with an analysis of Section 301(*l*). It found that Section 301(*l*) was clear, that it prohibited any variances from toxic pretreatment standards, and that this prohibition was fully in accord with the thrust of the 1977 amendments to the law. It also found no convincing policy grounds to differentiate FDF

variances from other variances indisputably prohibited by Section 301(*l*). Thus, the Third Circuit ruled that the FDF variance for toxic pretreatment standards violated Section 301(*l*). (Pet. App. A40–A43).

EPA therefore invites this Court to begin its analysis with something other than the plain words of the statute. Neither the Clean Water Act nor its legislative history mention the FDF variance, so EPA retreats to *duPont* and *EPA* v. *National Crushed Stone Ass'n.*, 449 U.S. 64, 72 (1980), which recognized EPA's implicit authority to grant FDF variances from *BPT effluent limits*.

Before *duPont*, EPA had used the FDF variance only for BPT limits. Its pretreatment and BAT standards did not contain FDF variance clauses. The variance, however, proved a convenient crutch for the standard-setters. In 1978, therefore, EPA added an FDF variance to the pretreatment program for the first time. In 1979, it added the same variance to its BAT standard-setting program. EPA now seeks justification for its expanded use of the FDF variance in *duPont*. *DuPont*, says EPA, prospectively sanctioned FDF variances from BAT as well as BPT limits (and hence, by analogy, from pretreatment standards too). EPA is wrong.

DuPont and *National Crushed Stone Ass'n.* were, indeed, pivotal cases. They cleared the way for the first phase of EPA's regulatory program. They allowed EPA to sidestep the quagmire of case-by-case standard-setting with industry-wide rules. In the words of one enthusiastic Member of Congress, *duPont* especially "quashed any hopes these industries had of getting around the law." 1977 *Legis. Hist.*, *supra*, at 1318. But neither case had the broad reach EPA now ascribes to it.

DuPont tried to reconcile the Clean Water Act's application of BPT to "point sources" with the overall statutory scheme which applies BAT (and pretreatment and new source standards) to "categories and classes" of sources. The Court concluded that BPT, like BAT, could be set by industry-wide regulations "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its *1977* [*i.e.*, *BPT*] limitations." 430 U.S. at 128

(emphasis added). In short, *duPont* held that the FDF variance was a "necessary aspect" of BPT limits. *National Crushed Stone Ass'n.*, *supra*, 449 U.S. at 72. *DuPont* also implicitly found that an FDF variance was not a necessary aspect of BAT limits because it upheld BAT rules which did not contain an FDF variance clause.[15]

Congress may have been ambiguous in its instructions to EPA with respect to BPT, but it was explicit regarding BAT. Congress created its own BAT variance in Section 301(c) of the Act, 33 U.S.C. 1311(c), and deemed this the sole deviation from otherwise uniform, national standards:

> *Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible.* The Administrator is expected to be precise in his guidelines *** so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.

1972 *Legis. Hist.*, *supra*, at 309 (emphasis added).

EPA seizes *duPont's* statement that there is no "radical difference in the mechanism used to impose limitations for the [BPT] and [BAT] deadlines." 430 U.S. at 127. EPA takes the statement out of context. As this Court explained: "[N]o proper inference could be drawn from *duPont* that the grounds for issuing variances from the [BAT] limitations should also be the grounds for permitting individual point sources to depart from [BPT] standards. Indeed, our opinion recognized that 301(c) was designed for BAT limitations." *National Crushed Stone Ass'n.*, 449 U.S. at 73, n.13 (citation omitted). Just because variances may be granted from BPT limits on grounds that a source is "fundamentally different" from others in the category does not mean that the same arguments entitle

[15] As the Court explained, "The regulations for each subcategory contain a variance clause *applicable only to the [BPT] limitations*" 430 U.S. at 122-123 (emphasis added).

a source to a variance from BAT or pretreatment standards. (See discussion, pp. 33–35, *infra*).

Indeed, *duPont* struck down nonstatutory variances for new source standards for reasons equally applicable to pretreatment standards. Both pretreatment and new source standards cover categories of sources, rather than individual point sources. Cf. §307(b)(3), 33 U.S.C. 1317(b)(3) with §306(b), 33 U.S.C. 1316(b). Pretreatment, unlike BPT limits, are expressly labelled "standards" in the Act. *Id.* Pretreatment, like new source, standards may require "no discharge."[16] As with new source standards, it is "unlawful for *any* owner or operator of *any* source to operate *any* source in violation of" a pretreatment standard. Section 307(d), 33 U.S.C. 1317(d) (emphasis added). Finally, there is no statutory provision for variances,[17] and a variance provision would be inappropriate because Congress intended pretreatment, like new source standards, to ensure national uniformity and maximum feasible control. See generally 430 U.S. at 138.[18] Thus, *duPont* does

[16] Section 307(b)(1), 33 U.S.C. 1317(b)(1), specifies that a pretreatment standard must "*prevent* the discharge of *any* pollutant *** which *** interferes with, passes through, or otherwise is incompatible with [the publicly owned treatment works]." (emphasis added).

[17] Sources may be able to get a "credit" for pollutant removal occurring at the publicly owned treatment works, §307(b)(1), 33 U.S.C. (Supp. V) 1317(b)(1), but there are no exceptions to the level of control demanded by the standards.

[18] EPA takes issue with *duPont's* distinction between new source standards and BPT limits. EPA asserts that BPT limits have, at times, required "no discharge" just like new source standards, and that BPT limits cannot be violated once they are incorporated in a permit either. (EPA Br. 22, n.15). This misses the point. New source standards are not interim measures like BPT. They force technology to the level of the best possible performer. Pretreatment standards, like BAT, serve the same function. 1977 *Legis Hist.*, *supra*, at 271, 342, 403, 461, 690. As noted earlier, pretreatment standards should "prevent, *to the maximum extent feasible*, the industrial pollutants from entering [the municipal sewage] plant in the first place." *Id.* at 690 (emphasis added).

CMA, on the other hand, argues that new sources are distinguishable from existing indirect dischargers on policy grounds. New sources have not yet been constructed, says CMA, so uniform standards will not require changes in technology, operation or processes for these plants. (CMA Br.

(footnote continues)

not give EPA broad authority to create variances from pretreatment or BAT standards. More important, *duPont* does not address Section 301(*l*), which was enacted after *duPont*. The question here, however, is the meaning of Section 301(*l*). *DuPont* has no bearing on this issue. Hence, petitioners' reliance on *duPont* is misplaced.

2. Section 301(*l*) of the Clean Water Act clearly prohibits FDF variances from pretreatment standards for toxic pollutants.

The essence of the Third Circuit's ruling is that Section 301(*l*) of the Clean Water Act is clear: it provides that EPA "may not modify any requirement of [Section 301] as it applies to" a toxic pollutant. Pretreatment standards are indisputably requirements of Section 301. EPA's FDF variance would nonetheless have allowed EPA "on a case-by-case basis" to "adjust" pretreatment standards, making them less stringent for some plants.[19] The court of appeals correctly ruled that these changes "modify" pretreatment standards so as to fall within the prohibition of Section 301(*l*). (Pet. App. A40-A43).

Below, petitioners were united in their theory of this case. They now part ways. CMA argues that an FDF variance is not a "variance" at all, but rather "an individualized BAT limitation or standard, based on the application of the statutory BAT factors to that plant." (CMA Br. 28). Hence, says CMA, an FDF variance could not possibly "modify" a requirement of Section 301. CMA engages in sophistry. Once EPA pro-

(footnote continued)

21, n.22). This argument is specious. New sources can be just as variable in their processes as existing sources—or more so. Moreover, variability for new sources is more difficult to anticipate in a rulemaking because the companies which will be affected and the processes they will seek to construct may not yet be identifiable. In any event, it is up to Congress to decide whether variances from pretreatment and BAT standards for toxics should be prohibited as they are for new sources. Arguments as to whether Congress made the proper choice are irrelevant.

[19] 40 C.F.R. 403.13(b)(Pet. App. A122). The rules would also have allowed EPA to make pretreatment standards "more stringent," but this addition is purely disingenuous, as all FDF variance applications for both direct and indirect dischargers have sought weaker, not stronger, pollution control limits.

mulgates a pretreatment standard, all sources in the affected industrial category must comply with a uniform, national standard unless they obtain an FDF variance. Whether the FDF alteration is called a "variance" or an "individualization," it "modifies" otherwise applicable requirements. See pp. 30–32, *infra*.

EPA initially agreed with CMA. Throughout this litigation—indeed, in its petition for certiorari—EPA argued that an "FDF variance does not 'modify' a requirement of Section 301 ***." (EPA Pet. 13). Now EPA concedes that "on first reading the statutory language appears to support the Third Circuit's analysis *** and an FDF variance 'modifies' such a [pretreatment] standard in the dictionary sense of the word, *i.e.*, it changes or alters it." (EPA Br. 24).

Instead, EPA now advances a new justification for ignoring the plain language of Section 301(*l*). EPA fabricates a conflict between Section 301(*l*)'s prohibition against "modifying" toxic limits for particular sources and EPA's duty to "revise" national pretreatment standards "from time to time, as control technology, processes, operating methods, or other alternatives change." Section 307(b)(2), 33 U.S.C. 1317(b). (EPA Br. 25).

EPA's new theory is a red herring. It confuses variances with periodic improvements to a rule. The dictionary defines "revise" to mean "correct," "improve," or "make *** up-to-date." *Webster's Third New International Dictionary* 1944 (1976). "Modify," on the other hand, has two senses. EPA mentions one, *i.e.*, "change," but omits mention of the other, "make more temperate and less extreme: lessen the severity of: moderate." *Id.* at 1452.

Congress used both senses of the word "modify" in the Clean Water Act to mean simply any change, such as a change in an industrial facility subject to the Act,[20] or a specific type of change, *i.e.*, a variance. It consistently used the latter sense of the word throughout Section 301—indeed, it did so twenty-

[20] *E.g.*, Section 208(b)(2)(C)(ii), 33 U.S.C. 1288(b)(2)(C)(ii), of the Act requires that areawide waste treatment management plans regulate the "location, modification, or construction" of polluting facilities.

five times. Each time Congress employed the word "modify" to create authority to vary pollution control requirements. Each time, it allowed EPA to tailor national standards to individual plants. Thus, a company could, under carefully circumscribed conditions, obtain relief from Section 301 requirements for economic reasons, Section 301(c), 33 U.S.C. 1311(c); water quality reasons, Section 301(g), 33 U.S.C. (Supp. V) 1311(g); or lack of a publicly owned treatment works to accept the company's wastes, Section 301(i)(2), 33 U.S.C. (Supp. V) 1311(i)(2). In addition, a publicly owned treatment works could obtain a reduction of Section 301 requirements for discharges to marine waters, Section 301(h), 33 U.S.C. (Supp. V) 1311(h), or lack of federal construction grant funds, Section 301(i)(1), 33 U.S.C. (Supp. V) 1311(i)(1).

Congress plainly understood "modify" in Section 301 to be synonymous with "variance:" it repeatedly equated the words "modification" and "waiver,"[21] and it called Section 301(c) a "variance" provision even though the language of that section speaks solely of "modified" pollution control requirements. 1977 *Legis. Hist.*, *supra*, at 461.

Because the latter legislative history is so at odds with EPA's position here, EPA tries to dismiss it as a "passing" reference during floor debate. (EPA Br. 28). The speaker was, however, Senator Muskie, Chairman of the Subcommittee on Environmental Pollution and principal author of the 1977 amendments on toxics. His words, entitled to considerable weight on their own, are buttressed by the equation of the two terms in the Senate Committee Report.[22] Indeed, EPA itself used the words "variance" and "modification" interchangeably four times in its Senate testimony.[23] This Court,

[21] See, *e.g.*, the discussion of Section 301(c), 1977 *Legis. Hist.*, *supra*, at 328-329, 331; Section 301(g), *id.* at 328-329, 331, 355, 641, 674-676, 866, 876; and Section 301(h), *id.* at 320-321, 447-448, 639, 677-678, 859, 876, the economic capability, water quality, and ocean discharge waivers, respectively.

[22] *Id.* at 676-677. The Committee called the statutory 301(g) modification provision a "variance."

[23] EPA used the term "variance" to describe both the statutory 301(c) modification provision, *id.* at 1102, 1124, and the statutory 301(h) modification provision, *id.* at 1419, 1438.

too, has equated the two terms in construing the very section of the Clean Water Act at issue here.[24] In short, "modify" in Section 301 means a "waiver" or "variance" from pollution control standards.

There is no conflict between a ban against variances and the duty to revise national standards. There are, for example, no variances from the Clean Water Act's new source performance standards, *duPont*, 430 U.S. at 137-139, yet EPA must periodically revise these standards just like pretreatment standards. Section 306(b)(1)(B), 33 U.S.C. 1316(b)(1)(B). This Court has already ruled that "a variance is generally thought to be of specific applicability," whereas a revision may be general or specific depending on the circumstances. *Train* v. *NRDC*, 421 U.S. 60, 88-89 (1975). The instruction to revise pretreatment standards here was intended to avoid technological stagnation of national standards. It parallels the language Congress used to require EPA to update other nationally applicable rules after either periodic review of the rule or new developments in pollution control. Cf. Sections 301(d) (effluent guidelines) and 306(b)(1)(B) (new source standards), 33 U.S.C. 1311(d) and 1316(b)(1)(B), with Section 307(b)(2), 33 U.S.C. 1317(b)(2)[25].

Read together, these separate statutory provisions make EPA's obligations clear: EPA has a duty to develop the best national pollution control standards possible within the limits of current scientific knowledge. It has a concomitant duty to review these standards from time to time and update them to reflect new developments in technology. It cannot, however, make these national standards less stringent for individual plants, at least where toxics are concerned. This result may be decidedly inconvenient to EPA, but it is neither absurd nor unreasonable.

[24] In *National Crushed Stone Assn.*, this Court referred to the statutory 301(c) modification provision as a "variance." 449 U.S. at 71.

[25] Elsewhere in its brief, EPA acknowledges that revisions are more broadly applicable than variances. See, *e.g.*, EPA Br. 35, n.26: "Clearly *** this [revision] provision is intended to reflect periodic changes in the industry ***."

Since the statute is not ambiguous, EPA can't substitute its own interpretation for the plain words of Section 301(*l*). See *SEC* v. *Sloan*, 436 U.S. 103, 117-119 (1978). This is particularly true where, as here, EPA's interpretation of the statute does not square with the structure of the act itself. See *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272-275 (1968)(rejected narrow reading of statutory provision because it did not square with the structure of the statute). Nothing on the face of this statute authorizes EPA to read qualifying language into the plain words of Section 301(*l*)[26]. The statute does not say, "The Administrator may not, *pursuant to subsections (c) and (g) of this section*, modify any requirement of this section ***;"[27] it simply says there can be no modifications of any sort.

This Court has repeatedly held that an agency can neither enlarge upon, nor narrow, the terms of a statute. *Volkswagenwerk*, 390 U.S. at 273-275; *United States* v. *Calamaro*, 354 U.S. 351 (1957). Just because the act uses the word "modification" in Sections 301(c) and (g) does not mean that EPA can construe Section 301(*l*) to apply only to modifications under subsections (c) and (g). This construction of the statute would make Section 301(*l*) largely redundant—at least insofar as it applies to subsection (g), which, by its terms, cannot be applied to toxics.[28]

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[26] CMA contends that the general rulemaking authority contained in Section 501(a) of the Act, 33 U.S.C. 1361(a), constitutes independent statutory authority for the FDF variance, a claim that EPA itself does not advance. (CMA Br. 23). Section 501(a) authorizes the Administrator of EPA to "prescribe such regulations as are necessary to carry out his functions under this Act." Citation to Section 501(a) adds nothing to this case. This general grant of authority does not override the specific prohibition of Section 301(*l*). Moreover, the FDF variance may be an administrative convenience to EPA in the short run, but it is not "necessary" to development of pretreatment standards. See discussion, pp. 37–39, *infra*.

[27] Section 301(c), 33 U.S.C. 1311(c), allows BAT standards to be modified if they surpass the economic capability of the discharger. Section 301(g), 33 U.S.C. (Supp. V) 1311(g), allows similar modifications to BAT standards where water quality warrants. EPA contends here that Section 301(*l*) applies only to subsections (c) and (g) of Section 301.

[28] Section 301(g) allows the Administrator to modify standards governing the discharge of any pollutant "other than *** toxic pollutants."

In addition, if Congress intended subsection (*l*) to apply primarily to subsection (c), it would have had no reason to move the ban against variances for toxics *out of* Section 301(c) and into a separate, more broad-reaching statutory section. Yet this is precisely what the conferees did. S. 1952, the bill reported out of the Senate Environment and Public Works Committee, added a proviso to the original economic variance provision in Section 301(c) in order to ban variances for BAT and pretreatment standards.[29] This provision passed the Senate intact. 1977 *Legis. Hist.*, *supra*, at 1076. The conferees deleted the proviso from Section 301(c). Instead, they added subsection (*l*) and reworded the ban on variances so that it applied not only to pretreatment and BAT standards, but to all requirements of Section 301, including any more stringent toxic effluent standards.[30]

Significantly, the conferees did not affix the new subsection (*l*) to Sections 43 through 46 of the Conference bill, which amended Section 301 of the law and were entitled "Waiver" or "Modification" provisions. 1977 *Legis. Hist.*, *supra*, at 203-207. Instead, they affixed subsection (*l*) to Section 53 of the Conference bill, entitled "Toxic Pollutants." *Id.* at 210-211. This section bypassed cumbersome rulemaking proceedings and listed the specific toxic pollutants of concern to Congress. It required each source of these pollutants to meet effluent limitations reflecting best available technology, and gave the Administrator authority to set even more stringent toxic effluent standards (or an outright prohibition on discharge) if warranted. It also made a series of other statutory changes, all intended to enhance control of toxics. *Id.* at 459-460. Congress's deliberate placement of Section 301(*l*) here, rather than in portions of the bill amending Section 301(c) of the

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[29] The proviso read: "[T]he Administrator may not modify the requirements of subsection (b)(2)(A) of this section [*i.e.*, the BAT and pretreatment standards] with respect to any specific pollutant which the Administrator is charged with a duty to regulate as a toxic or hazardous pollutant ***." 1977 *Legis. Hist.*, *supra*, at 584.

[30] The Administrator has discretion to set toxic effluent limits more stringent than BAT if BAT is not effective against persistent, hazardous toxics. Sections 301(b)(2)(D)and 307(a), 33 U.S.C. (& Supp. V) 1311(b)(2)(D) and 1317(a).

law, further evidences Congress's intent that subsection (*l*) operate as a general ban on variances for toxics and not, as EPA contends, as a mere refinement of the conditions for obtaining a Section 301(c) economic variance.[31]

3. The legislative history of the Clean Water Act confirms that Congress intended to ban all variances, including FDF variances, from pretreatment standards for toxic pollutants.

Having decided that the language of Section 301(*l*) was clear, the court of appeals properly examined the legislative history to confirm its reading of the statute. *United States* v. *Culbert*, 435 U.S. 371, 374, n.4 (1978); *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976); *United States* v. *Missouri Pacific Railroad Co.*, 278 U.S. 269, 278 (1929). The court found two overriding themes: first, the elimination of the discharge of toxic pollutants had always received special emphasis under the Act, increasingly so during the 1977 amendments. (Pet. App. A40). Second, Congress used the term "modification" interchangeably with "waiver" and "variance." Since Section 301(*l*) forbids modifications, the court reasoned, it forbids variances such as the FDF variance. (Pet. App. A41-A43).

EPA counters with two arguments. First, says EPA, Congress was primarily focusing on the statutory modifications which Congress had authorized [*i.e.*, Sections 301(c) and (g)], rather than on the FDF variance. Second, and in EPA's view "more telling," is the absence of any express indication that Congress intended to alter EPA's allegedly "well-established"

[31] EPA does not address the implications of moving the ban on variances for toxics out of subsection (c) and into a separate subsection. CMA does, but offers an explanation that is both ineffectual and wholly unsupported by citation to the legislative history. (CMA Br. 29-30). CMA hypothesizes that Congress consolidated the ban in subsection (*l*) to avoid repeating it in both subsections (c) and (g). If so, Congress's action was futile, because subsection (g) still contains an express prohibition on variances for toxics. Moreover, CMA ignores the fact that Congress not only moved the ban, it also amended the language so that subsection (*l*) now reaches beyond the BAT standards addressed in subsection 301(c). This makes it even more unlikely that Congress only had Section 301(c) in mind when it wrote Section 301(*l*).

and "well-known" practice of "granting FDF variances." (EPA Br. 28). Neither argument withstands analysis.

EPA's first point, that Congress's focus lay elsewhere, is simply a subterfuge for the lack of any legislative history to demonstrate that Section 301(*l*) limits only Section 301(c). EPA's case hinges on a single word in Congressman Roberts' floor explanation of the conference bill:

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, *specifically*, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.

1977 *Legis. Hist.*, *supra*, at 328-329 (emphasis added). This alone proves nothing. Congressman Roberts had no reason to list other examples of variances prohibited by section 301(*l*). Congress did not believe other variances were authorized, 1972 *Legis. Hist.*, *supra*, at 172, 309, and EPA had not yet promulgated an FDF variance for either pretreatment or BAT standards. (See discussion of EPA practice, p.28–29, *infra*). In any event, the impetus for restricting variances came from the Senate, and the conferees intended the more explicit discussions in the Senate Report to govern. 1977 *Legis Hist.*, *supra*, at 434.

The Senate Report plainly states: "In order to reemphasize that modifications to BAT are intended for non-toxic *** pollutants[32] only, the bill prohibits variances for [toxic] pollutants." 1977 *Legis. Hist.*, *supra*, at 677. Senator Muskie reiterated this point during the debate on the conference substitute: "*Like toxic pollutants for which there are no waivers or modifications*, there are no potential waivers or modifications for conventional pollutants." *Id.* at 458 (emphasis added).

[32] The Senate bill would also have allowed waivers for conventional pollutants, but this was deleted in conference in favor of "best conventional pollution control" requirements. See n. 4, *supra*.

The House, which accepted the Senate language in conference, understood the bill to contain a ban on waivers for toxics. Mr. Roberts said:

> Another major problem area was the law's strict requirements for industry that would cost millions of dollars and result only in a little more clean-up of our waters. The conferees wrestled with this problem and developed a fair and workable compromise. *Strict requirements are still in effect for damaging pollutants, such as toxics. However, for certain other pollutants, industry may get a waiver.*

Id. at 305 (emphasis added). Indeed, some House Members wondered aloud whether Congress had, by denying any waivers for toxics, gone too far: "[T]he classification of an extensive new listing of substances as 'toxic'—an action not taken in either the House or Senate versions of the bill—and *denial of any waiver with respect to these materials* can lead to new regulations more restrictive than any previously contemplated." *Id.* at 411 (emphasis added). These repeated assertions of no variances, waivers, or modifications for toxics contain no qualifying language.

To create an exception for the FDF variance, EPA must resort to inference. Even if this were a permissible way to read either the statute or the legislative history—and we submit it is not—the inference here does not fit the direction in which Congress sought to move the law. The 1977 amendments effected a "major redirection" of EPA's regulatory program in order to control toxics. *Id.* at 326, 454. Congress found "the only practical way" to solve this ubiquitous problem was "on an industry-by-industry basis *** [by] category or subcategory." *Id.* at 455. Variances for individual sources could only impede the effectiveness of this statutory scheme.

Thus, the 1977 amendments plainly sought to curtail EPA's authority to grant case-by-case variances from upcoming pollution control requirements. For example, Congress eliminated, at least for toxics, the only provision in the 1972 Act allowing modifications of BAT standards [*i.e.*, the economic capability waiver of Section 301(c)].[33] At the same time, Congress created only one new modification provision for BAT, the water quality variance of Section 301(g). It expressly precluded toxics from the reach of this variance and, even with respect to other pollutants, imposed strict conditions on its use, including possible filing of a bond or other security to assure compliance.[34] Finally, Congress refused to accept other variances such as a two year stay of requirements for industries, like the financially hard-pressed steel industry, vital to the "national interest." 1977 *Legis. Hist.*, *supra*, at 324.

It is inconceivable that Congress would have gone to such detail in specifying when and where variances could be created if, as EPA contends, it intended to leave open "the question [of] which changes are allowed and which are proscribed." (EPA Br. 26). Indeed, EPA's assertion that Section 301(*l*) must have been intended to rule out statutorily created variances, not "nonstatutory" variances such as the FDF violates a cardinal rule of statutory construction. Where Congress has expressly created exceptions to a statute, "nonstatutory" exceptions are not available. *TVA* v. *Hill*, 437 U.S. 153, 188 (1978).

EPA argues that the well-settled rule of law restated in *TVA* v. *Hill* is "flatly inconsistent with *duPont*." (EPA Br. 30). EPA misconstrues both cases. *TVA* addressed the ex-

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[33] The Senate wanted to extend this ban to nonconventional pollutants, those in the gray area between toxics and conventionals, as well, but abandoned this point in conference only "in order to obtain action on this legislation." 1977 *Legis. Hist.*, *supra*, at 429.

[34] To qualify for a Section 301(g) variance, a source must show: 1) that it will comply, at a minimum, with any applicable BPT, secondary treatment, state law, or water quality requirements; 2) that a variance for this source will not result in any additional requirements for any other source; and 3) that a variance will not adversely affect human health or the environment. In addition, while its application is pending, the source must continue to comply with the standards from which a variance is sought unless the Administrator grants a stay after finding that there is a substantial likelihood the application will succeed on the merits. If the Administrator so finds, he may condition a stay on the filing of a bond or other security to assure timely compliance in the event that the variance is denied. 33 U.S.C. (Supp. V) 1311(g) and (j).

ceptions to a statutory rule; *duPont* wrestled with Congress's silence on what the rule itself should be. *DuPont* was precipitated by the Clean Water Act's failure to say whether BPT limits should be set nationally or case-by-case. The Act appeared to warrant national standards akin to BAT and new source standards, but it used different language to describe the BPT limits. The BAT provisions focused on "categories and classes" of sources; the BPT provisions spoke of individual "point sources". *DuPont* resolved the tension between the ambiguous language of Section 301 and the overall thrust of the statute with a hybrid resolution of the issue. The Court concluded that BPT, like BAT, can be set by industry-wide regulations "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations." 430 U.S. at 128.

DuPont did not, as EPA claims, hold that nonstatutory variances are appropriate for either BAT or any other standards. To the contrary, the court struck down a nonstatutory variance for new source standards, *id.* at 137-139, and it upheld EPA's BAT limits even though they did not contain an FDF variance clause. *Id.* at 122-123. Hence *duPont* and *TVA* are not inconsistent. Both cases underscore that EPA may not create exceptions to Section 301(*l*)'s ban on variances from national pretreatment standards.

EPA nonetheless frames the question before this Court as follows: did Congress intend to reverse *duPont*?[35] This misses the mark. *DuPont* only approved FDF variances for *BPT limits*. The BAT regulations then before the Court did not contain an FDF variance clause. The Court appropriately assumed that the only BAT variance was the economic capability waiver under Section 301(c) of the Act, and it limited its discussion of BAT variances to Section 301(c).

Congress did address this aspect of *duPont* in 1977: it eliminated Section 301 variances for toxics. 1977 *Legis. Hist.*, *supra*, at 328. Of course, Congress was fully cognizant of the

[35] EPA cites *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) to no avail. The traditional admiralty rule at issue there was both well-settled and well-known. In *Edmonds*, unlike here, there could be no question that Congress acted with the rule in mind.

many arguments that would be put before reviewing courts to find the BAT standards variable. That is why it created Section 301(g) variances:

> The bill intends to give the Administrator of EPA a *safety valve in the event that the courts find he does not have flexibility in administering the 1983 [BAT] requirements* for industries. It authorizes a case-by-case exemption for industries which demonstrate, to the satisfaction of the Administrator, that pollutants in their discharge are not toxic *** [and] will not interfere with the attainment of the national water quality standard ***.

Id. at 674 (emphasis added). But Section 301(g), like 301(c), variances were not available for toxics. *Id.* The intent is clear: Congress did not want EPA to vary toxic BAT and pretreatment standards. It did not need to reverse *duPont* to accomplish this. *DuPont* is fully consistent with a ban on variances for pretreatment and BAT standards.

EPA's final argument is that Congress, by its inaction, ratified the agency-created FDF variance. This Court has, however, previously ruled that silence is, at best, a "treacherous" guide to Congressional intent; Congress's inaction may betoken nothing more than unawareness or preoccupation with other issues. *Zuber* v. *Allen*, 396 U.S. 168, 185-186, n. 21 (1969).

This case, more than most, illustrates the wisdom of that maxim. EPA cannot show that Congress was *actually* aware of EPA's creation; to the contrary, EPA concedes that the legislative history is "devoid of any reference" to the FDF variance. (EPA Pet. 14). Instead, EPA argues that Congress must have known, exaggerating how "well-entrenched" the variance was in EPA practice. (EPA Br. 29). EPA's argument flouts the facts. Only two of 4,000 sources covered by BPT effluent guidelines had actually received an FDF variance by 1977.[36] EPA did not deem the variance sufficiently noteworthy

[36] *Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. 2741 (1983) [hereinafter cited as 1983 *Hearings*].

to mention in testimony to either the House, 1977 *Legis. Hist.*, *supra*, at 1399-1472, or the Senate, *id.* at 1093-1139.[37]

True, EPA had regulations which, though largely not invoked in practice, had at least theoretically established FDF variances from BPT limits. But this Court has previously ruled that the mere existence of agency regulations is not a sufficient basis from which to presume Congress's knowledge of their content. *United States* v. *Calamaro*, 354 U.S. 351 (1957). It has even refused to infer Congressional approval of agency action in the face of express indications that Congress knew of the action. *TVA* v. *Hill*, 437 U.S. 153 (1978); *SEC* v. *Sloan*, 436 U.S. 103, 121-123 (1978)(Senate Committee Report not sufficient indication of widespread Congressional awareness). It does not necessarily follow that because EPA had regulations, Congress knew of them.

Nor would *duPont* have warned Congress that it needed to renounce FDF variances for BAT and pretreatment standards by name. First, *duPont* did not, as EPA claims, prominently discuss FDF variances. (EPA Br. 29). As noted earlier, *duPont* resolved the broader question of whether EPA could even set industry-wide regulations under the Clean Water Act. A few sentences in that opinion mention the existence of a variance, but the Court otherwise declined to address its content or proper scope. Congress focused on the case's broad holding: as one Member said, it "quashed any hopes these industries had of getting around the law." 1977 *Legis. Hist.*, *supra*, at 1318.

More important, while *duPont* discussed BPT and BAT rules, it approved an FDF variance only for BPT. As noted earlier, the rules reviewed in *duPont* contained an FDF variance clause applicable only to the BPT rules. In 1977,

[37] By contrast, Congress was made aware of the FDF variance during the current reauthorization of the Clean Water Act. EPA brought the issue prominently to Congress's attention, asking the House Subcommittee on Water Resources to reverse the Third Circuit's decision. 1983 *Hearings* at 2705-2706, 2724-2726, 2740-2741, 2747-2748. The House passed a bill which declined to do so. H.R. 3282, 98th Cong., 2d Sess. (1984). The bill reported out of the Senate Environment and Public Works Committee the day after the Third Circuit's decision does not contain authority for FDF variances either. S. 431, 98th Cong., 1st Sess. (1983).

however, Congress focused on BAT, not BPT. BPT was merely an interim, "time-limited" measure before final pollution controls. 1977 *Legis. Hist.*, *supra*, at 459. BPT controlled conventional pollutants, not toxics; any toxic removal it obtained was purely incidental to its primary purpose. *Id.* at 335, 1101. By 1977, most sources had complied with BPT, *id.* at 641, and the pollution control results had been greater than anticipated. *Id.* at 330. Therefore, in the reauthorization, Congress's attention shifted sharply toward toxic pollutants and the BAT and pretreatment requirements designed to control them. *Id.* at 335-336, 454-455, 689-691, 1135-1136. Since Congress considered, and curtailed the circumstances under which these requirements could be modified, it does not make sense to assume that Congress, without mention, would have simultaneously authorized EPA to grant nonstatutory variances for toxic pollutants.

EPA notes that BPT regulations sometimes apply to toxics, citing the rules at issue in *duPont* and in an agency decision granting an FDF variance to a steam electric plant. (EPA Br. 30). EPA infers that if Congress had intended to ban FDF variances for toxics, it would have criticized this aspect of *duPont*. Nothing in *duPont*, however, suggests this fact to Congress and the cited agency decision is unpublished. This is a slim reed on which to rest an argument that Congress's failure to act makes new law. Congress knew that BPT would have "incidental benefits in control of toxics in some industries." EPA had told it so, but had also warned that "even with BPT controls there will continue to be major discharges of toxic pollutants, many of which are potential threats to public health." 1977 *Legis. Hist.*, *supra*, at 1101. In BAT, Congress committed to a second, major, and more stringent phase of technology-based controls. *Id.* at 454-455. Its failure to direct EPA to spend scarce resources wringing more out of BPT for a few plants when BAT would shortly be on line for all is not significant.

In any case, it defies logic to say, as EPA apparently does, that because EPA had adopted an FDF variance for one purpose (*i.e.*, for modifying BPT limits), Congress acquiesced in the use of the variance for other purposes, such as adjusting pretreatment or BAT standards. This Court has

already ruled that Congress will not be presumed to have adopted an agency's construction of a statute when the construction does not apply to the precise conditions passed on prior to re-enactment. *United States* v. *Missouri Pacific Railroad Co.*, 278 U.S. 269, 279-280 (1929). See also *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959).

EPA had a well-established practice in 1977 of distinguishing in its regulations between BPT limits, on the one hand, and pretreatment and BAT standards, on the other, for variance purposes. BPT regulations contained FDF variance provisions; pretreatment and BAT standards did not. By the end of 1977, EPA had promulgated pretreatment standards for 21 industrial categories. None contained an FDF variance.[38] Likewise, EPA had promulgated at least twenty-one BAT standards. These, too, lacked an FDF variance.[39]

[38] In five industrial categories, the agency set numerical limits for a specific pollutant or pollutants without establishing any variances. 41 Fed. Reg. 53930-53938 (Dec. 9, 1976) (timber products processing); 42 Fed. Reg. 15684 - 15690 (Mar. 23, 1977) (petroleum refining); 42 Fed. Reg. 15690 - 15696, (Mar. 23, 1977) (steam electric); 42 Fed. Reg. 35834 - 35843 (July 12, 1977) (electroplating); 42 Fed. Reg. 37294 - 37301 (July 20, 1977) (inorganic chemicals manufacturing). In sixteen industrial categories, the agency declined to set specific pollutant-by-pollutant limits. The agency held these industries only to the general "prohibited wastes" standard of 40 C.F.R. 128.131; that is, they could not discharge wastes which would "interfere with the operation or performance" of the municipal sewage treatment plant. 38 Fed. Reg. 30982 - 30984 (Nov. 8, 1973). At the same time, the agency determined that the BPT-level effluent limitations applicable to direct dischargers did not apply to indirect dischargers in the same industrial category. 40 Fed. Reg. 6432 - 6447 (Feb. 11, 1975) (dairy products processing; grain mills; canned and preserved fruits and vegetables processing; canned and preserved seafood processing; beet and liquid and crystalline cane sugar processing; cement manufacturing; feedlots; organic chemicals manufacturing; soap and detergent manufacturing; glass manufacturing; asbestos manufacturing; pulp, paper and paperboard; meat products; builder paper and roofing felt segment of the builders paper and board mills); 40 Fed. Reg. 55770 - 55801 (Dec. 1, 1975) (canned and preserved seafood processing); 41 Fed. Reg. 16272 - 16286 (Apr. 16, 1976) (canned and preserved fruits and vegetables processing); 42 Fed. Reg. 15696 - 15704 (Mar. 23, 1977) (leather tanning); 42 Fed. Reg. 26979 - 26984 (May 26, 1977)(textile mills).

[39] *E.g.*, 39 Fed. Reg. 4034-4038 (Jan. 31, 1974) (sugar processing); 39 Fed. Reg. 5704-5708 (Feb. 14, 1974) (feedlots); 39 Fed. Reg. 5712-5719

(footnote continues)

Several early pretreatment and BAT rulemakings presented the very facts which EPA now uses to justify an FDF variance (*i.e.*, unique plants within a larger industrial category). In each case, EPA resolved industry's concern without resort to an FDF variance. It chose a variety of tools. In some cases, it created a new subcategory;[40] in others, it told sources to avail themselves of the economic variance contained in section 301(c) of the Act.[41] In still others, it emphasized that pretreatment and BAT standards (unlike BPT) would be revised and encouraged sources to participate in the revision.[42] Throughout, EPA applied FDF variances only to BPT limits.

(footnote continued)

(Feb. 14, 1974) (glass manufacturing); 39 Fed. Reg. 6590-6594 (Feb. 20, 1974) (cement manufacturing); 39 Fed. Reg. 7526-7533 (Feb. 26, 1974) (asbestos manufacturing); 39 Fed. Reg. 7894-7906 (Feb. 28, 1974) (meat products); 39 Fed. Reg. 9612-9635 (March 12, 1974) (inorganic chemical manufacturing); 39 Fed. Reg. 10512-10518 (March 20, 1974) (grain mills); 39 Fed. Reg. 10862-10868 (March 21, 1974) (canned and preserved fruits and vegetables processing); 39 Fed. Reg. 11510-11514 (March 28, 1974) (electroplating); 39 Fed. Reg. 12502-12522 (April 5, 1974) (plastics and synthetics); 39 Fed. Reg. 13370-13393 (April 12, 1974) (soap and detergent manufacturing); 39 Fed. Reg. 14676-14683 (April 25, 1974) (organic chemical manufacturers); 39 Fed. Reg. 16578-16581 (May 9, 1974) (builders paper and roofing felt segment of the builders paper and board mills category); 39 Fed. Reg. 18594-18609 (May 28, 1974) (dairy products processing); 39 Fed. Reg. 18742-18752 (May 29, 1974) (pulp, paper and paper board); 39 Fed. Red. 24114-24130 (June 28, 1974) (iron and steel manufacturing); 39 Fed. Reg. 24736-24749 (July 5, 1974) (textile industry); 40 Fed. Reg. 4582-4607 (Jan. 30, 1975) (canned and preserved seafood processing); 40 Fed. Reg. 55770-55801 (Dec. 1, 1975) (canned and preserved seafood processing); 41 Fed. Reg. 16272-16286 (Apr. 16, 1976) (canned and preserved fruits and vegetable processing).

[40] *E.g.*, 39 Fed. Reg. 24736 (July 5, 1974).

[41] *E.g.*, 40 Fed. Reg. 55770, 55776 (Dec. 1, 1975).

[42] *E.g.*, EPA designated the timber product processing pretreatment rules "interim final" and simply solicited more information for the final round of rulemaking: "[T]here may be specific situations where the costs may be underestimated. However, these costs are considered average. The Agency solicits the submission of cost information to support the contention that the costs presented are too low." 41 Fed. Reg. 53930, 53933 (Dec. 9, 1976). See also 40 Fed. Reg. 55770, 55776 (Dec. 1, 1975).

In 1977, EPA rethought the matter and proposed to adopt FDF variances for future pretreatment standards. 42 Fed. Reg. 6476, 6497 (Feb. 2, 1977). It never notified Congress of its potential change of heart, nor did it resolve the matter at any time during 1977 when EPA's new policy could have been brought to the attention of Congress.[43] Instead, EPA continued to deliberate until mid-1978, when it first announced that it would allow industry to obtain FDF variances from all pretreatment standards.[44] Shortly thereafter, EPA proposed to establish FDF variances from BAT standards also,[45] a proposal that was not adopted until mid-1979.[46]

EPA surely can't argue that Congress ratified its *proposed* rule, for this would amount to adopting an agency's thinking before the agency had itself completed or committed to the thought. Instead, EPA asks this Court to infer that Congress, by its silence, ratified FDF variances for pretreatment standards even though the agency had never mentioned such a variance to Congress; no source had ever applied for a pretreatment variance; the variance did not exist in any pretreatment rule or regulation of the agency; and the only regulations then on the books distinguished between BPT limits, where the variance was allowed, and pretreatment and BAT standards, where it was not. The argument is absurd on its face. If Congress ratified any practice in 1977, it was the absence, not the presence, of an FDF variance for pretreatment and BAT standards.

4. FDF variances for toxic pretreatment standards are not reasonable given the purposes of the Clean Water Act.

a. Lacking a compelling legal argument, EPA turns to policy, alleging first that an FDF variance serves a different purpose than a Section 301(c) variance. Put simply, this argument supposes that an FDF variance is not a "variance"

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[43] As noted earlier, the agency's testimony before Congress never referred to the FDF variance. 1977 *Legis. Hist.*, *supra*, at 1093-1139, 1399-1472.

[44] 43 Fed. Reg. 27736, 27757 (June 26, 1978).

[45] 43 Fed. Reg. 37078, 37088, 37132 - 37134 (Aug. 21, 1978).

[46] 44 Fed. Reg. 32854, 32893 - 32894, 32950 - 32951 (June 7, 1979).

at all, but rather a part of the standard-setting process in which EPA corrects prior errors. An FDF variance simply sets a BAT or pretreatment standard for an individual plant, says EPA, while a Section 301(c) variance excuses compliance with a requirement applicable to the larger class of dischargers.

This is a distinction without a difference. In *National Crushed Stone Assn.*, 449 U.S. at 74, this Court found that a Section 301(c) variance performs the precise role EPA ascribes to an FDF variance: it "creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class."[47]

Section 301(c) is a reexamination of BAT factors for an individual source. It does not matter whether the reexamination is triggered because an individual source is simply a more marginal operation than others in the same industry or because the factors that determine BAT (*i.e.*, raw waste load, discharge volume, energy requirements, age, process configuration) at a single plant are sufficiently different that the cost of achieving BAT-level performance is no longer affordable. In either case, Congress said there could be no escape from uniform BAT requirements for toxics because of inability to pay for available controls. It would be ironic indeed for Congress to have permitted the same result by reexamination of the factors contributing to a source's economic difficulty. Both FDF and Section 301(c) variances set either a new BAT or pretreatment standard for a single source. Both excuse the source from an otherwise applicable national standard. The

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[47] EPA focuses on this Court's discussion of the different eligibility criteria for each variance: Section 301(c) asks whether a modification "will represent the maximum use of technology within the economic capability of the owner or operator ***," 33 U.S.C. 1311(c), while an FDF variance addresses the statutory factors relevant to BPT. 449 U.S. at 78. This distinction does not, however, invalidate the Court's statement that the two variances serve the same purpose; it simply underscores the fact that *BPT and BAT limits* differ. As this Court explained, the Section 301(c) factors bear a substantial relationship to the considerations underlying BAT; they would, however, be inapposite in the BPT context because they would not apply the general requirements to an individual point source. *Id.* at 75.

two serve the identical function. It makes no sense to assume that Congress prohibited one, and not the other, for toxics.

b. EPA next claims that an FDF variance is "substantively indistinguishable" from either subcategorizing an industry during the rulemaking or revising a final rule. (EPA Br. 35-36). EPA mixes apples and oranges. Procedure aside, there are two striking differences between establishing special categories for a *group* of plants within a larger industrial category *before* issuing a rule and granting *individual* plant variances from a *final* standard. The first lies in the scope of the decision; the second, in its timing.

EPA here characterizes the FDF variance as a standard for either a plant or a group of plants (and thus akin to a subcategory), but the rule is actually designed for a single "Industrial User *within* *** [a] *subcategory*." 40 C.F.R. 403.13(b). (Pet. App. A122). It seeks data specific to the industrial variance applicant without regard to whether or not there are other similarly situated sources within the subcategory. It does not appear to recognize any connection between the information produced in the variance proceeding and the control requirements of the larger industrial category. If, for example, a variance requires more stringent controls for a particular facility (there have never been any such variance requests although EPA maintains their theoretical possibility), the rules do not seem to require EPA to decide whether to order further process changes in other sources or otherwise upgrade the standards to the level of this "best performer." The FDF variance is, in essence, a single plant evaluation designed primarily to waive control requirements for a single source.

Congress gave EPA some discretion to differentiate among sources within a category—it recognized, for example, the possibility of a "subcategory," 1977 *Legis. Hist., supra*, at 455—but not without limit. It did not give EPA carte blanche to entertain single plant evaluations. Congress wanted to avoid hobbling the standard-setting process with atypical concerns:

> [T]he pretreatment standards *** [should] be national in scope and addressed to the most significant pre-

> treatment problems. The Committee expects that the standards would vary with the broad type of treatment processes used, but the Committee does not intend that each individual treatment works would have its pretreatment standards set up by the Administrator.

1972 *Legis. Hist., supra*, at 800.

Pretreatment standards set control requirements for indirect dischargers comparable to BAT for direct sources. 1977 *Legis. Hist., supra*, 271, 342-343, 403, 461, 690-691. Thus, EPA should weigh the factors relevant to pretreatment standards, like those for BAT, only across whole industrial classes or categories:

> The Conferees intend that the factors described in section 304(b) be considered *only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class. Except as provided for in section 301(c) of the Act*, the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible.

1972 *Legis. Hist., supra*, at 172 (emphasis added).

Congress expressly cautioned against single plant evaluations:

> The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination.
>
> Thus, a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, *it should be avoided*.

Id. at 255. (emphasis added).

This caution took on added importance in the context of

BAT because Congress intended BAT to be more technology-forcing than BPT. 1972 *Legis. Hist.*, *supra*, at 170, 1468. BPT was geared to "the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." *Id.* at 169. Congress pegged BAT, by contrast, to "the best performer in any industrial category." *Id.* at 170.

It stands to reason that, in coming up to the level of the best performer in a category, individual plants might incur costs, energy requirements, or process disruptions wholly out of proportion to others, especially where local officials had previously required little pretreatment. Congress recognized that some plants might close, not just because they were less able to pay for pollution controls than others, but also because they would be required to make more "significant advancements in their levels of pretreatment" than others within the same industry. 1977 *Legis. Hist.*, *supra*, at 404.

Congress did not authorize less stringent standards for these plants (except for Section 301(c) variances for nontoxics). For toxic pretreatment standards, it insisted on state-of-the-art technology, suggesting other options such as removal credits or municipal pretreatment to shift the burden of control where feasible. *Id.* at 690-691. It remained, however, steadfast in its goal: "to prevent, to the maximum extent feasible, the industrial pollutants from entering the [municipal sewage treatment] plant in the first place." *Id.* at 690.

An FDF variance has no place in this technology-forcing scheme because it allows some sources to escape "best performance" levels for reasons that have nothing to do with what technology can achieve. For example, one strong indication that EPA has gone awry in transferring the FDF variance from the BPT to the pretreatment and BAT contexts lies in the agency's treatment of the cost factor. EPA told sources they could request an FDF variance for a "removal cost *** *wholly out of proportion to the removal cost* considered during development of the Standards ***." 40 C.F.R. 403.13(c)(2)(iv)(A)(Pet. App. A123) (emphasis added). EPA took this language virtually intact from BPT standard-setting where Congress told EPA to do a "limited cost-benefit

analysis" to ascertain whether "the additional degree of effluent reduction is *wholly out of proportion to the costs* ***." 1972 *Legis. Hist.*, *supra*, at 170. (emphasis added). Where costs are significantly greater than normal, the cost-benefit calculus for BPT changes.

For BAT and pretreatment, however, Congress adopted an entirely different cost test: "what is 'economically achievable' should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and *what is achievable through the application of available technology—without regard to costs.*" *Id.* (emphasis added). EPA has consistently defined BAT as that technology which is affordable across a whole industrial category. Comparative costs are not relevant to this inquiry.[48] Hence, EPA's FDF variance rules are out of place in the BAT context.

A second critical difference between the FDF variance and subcategorizing during a rulemaking is the timing of the decision on pollution control requirements. Here Congress left EPA no discretion. Congress wanted industry's pollution control obligations defined quickly. It gave EPA only nine months to set pretreatment standards.[49] It gave industry no more than three years from the date of promulgation to comply. Section 307(b), 33 U.S.C. 1317(b).

If sources are to meet this timetable, they have to embark at once on all the steps necessary to attain compliance—preliminary engineering, obtaining bids, awarding construction contracts, purchasing major equipment components, construction, trial operation, performance testing, and fine-tuning. The advanced technology required by these standards is, after all, hardly an off-the-shelf consumer item.

An FDF variance is antithetical to this timetable. FDF variance applicants must wait close to a year in the best of cases—considerably more on the average—to know their

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[48] By contrast, comparative costs—both among industries and between industries and municipalities—are relevant to "best conventional pollution control technology" requirements, 1977 *Legis. Hist.*, *supra.*, at 458, but there is no economic capability waiver from these requirements. *Id.* at 461.

[49] This deadline has been extended by the district court on several occasions, see n. 5, *supra*.

pollution control obligations.[50] If they wait for the variance to be resolved, they will miss the compliance deadline. If they do not wait, the variance is purely illusory. Nothing could be further from the scheme Congress had in mind.

An FDF variance is closer in timing to amendment or revision of a rule—at least each takes place after the rule is issued. They are not, however, "substantively indistinguishable." Because amendments or revisions are designed to effect changes in a rule, they are subject to the same constraints as the initial rulemaking; that is, they must address classes and categories of sources, not single plants.

Revisions also differ procedurally. The Clean Water Act requires EPA to revise its rules following the same streamlined, informal rulemaking procedures used to set pretreatment standards in the first place. Section 307(b)(1), 33 U.S.C. 1317(b)(1). Congress wanted quick, direct, and uniform corrections to erroneous or outdated rules.[51] The FDF variance, by contrast, is a Rube Goldberg contraption. It may entail review by as many as four separate tiers of government,[52] an

[50] EPA's FDF variance rules outline the following minimal procedures: 180 days from the effective date of the standard (longer if a "category determination request" is made) to apply for a variance; an unspecified amount of time for the agency to review the application, set the administrative machinery in motion, and notify the public that an application is pending; at least 30 days for public comment on the application; and an unspecified amount of time for either the State or the EPA regional enforcement division director to weigh the public comments and decide the request. If the request is denied, the following additional procedures may be invoked: 30 days to request a hearing from the Regional Administrator, some again unspecified time for the Regional Administrator to review the enforcement division director's decision and determine whether to hold a hearing, 30 days to appeal to the Administrator (apparently only if the hearing request is denied), additional time for the hearing itself, and an unspecified amount of time for either the Regional Administrator or the Administrator to render a decision. 40 C.F.R. 403.13(g) and (j) to (m) (Pet. App. A122-A127).

[51] For example, sources have only 90 days to ask a court to remand an erroneous EPA rule, unless they can show that their challenge is based on information arising after 90 days. Section 509(b)(1), 33 U.S.C. 1369(b)(1).

[52] An application is reviewed by the state, the EPA Enforcement Division Director, the EPA Regional Administrator and the EPA Administrator. 40 C.F.R. 403.13. (Pet. App. A122).

informal public comment period, a hearing, and coordination between EPA's rulemaking experts and diffuse state and regional office personnel. (See procedures described in n. 50, *supra*). Not surprisingly, the process has proved extraordinarily slow of resolution.[53]

EPA scoffs at this procedural issue, shielding its inept handling of FDF variance applications behind *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). EPA claims that, according to *Vermont Yankee*, an agency is free to choose its own rulemaking procedures. CMA cites *SEC* v. *Chenery*, 332 U.S. 194 (1947) for the same general proposition. Petitioners take both *Vermont Yankee* and *Chenery* too far. These cases are irrelevant where, as here, Congress has made the choice for EPA.

c. EPA also pleads that it needs an FDF variance because its final pretreatment standards may not always reflect the full range of factors the Administrator was supposed to consider. (EPA Br. 31). This could occur in one of three situations: when EPA overlooks information in its possession, when it is ignorant of information available to industry, or when relevant information is simply unavailable at the time of rulemaking.

The first situation occurs when EPA errs: it simply fails to consider information presented to it in a rulemaking. EPA cites two such cases in its brief. In *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979), EPA fell back

[53] EPA fabricates an inconsistency in NRDC's position on FDF variance procedures, alleging that NRDC wavers between calling the procedures too summary and too slow. (EPA Br. 36 and 34-35, n.26). EPA swings at its own straw man. See Transcript of Oral Argument in Court of Appeals at 249. NRDC has never said EPA would—or should—issue variances without public notice; it has simply said, correctly, that EPA's public notice procedures for FDF variances are laxer than those required for setting pretreatment standards because proposed variances need not be published in the Federal Register as proposed rules must clearly be. 5 U.S.C. 553. Thus, the notice procedures illustrate one more deviation from the route Congress mapped out for the agency. Whichever approach to public notice EPA takes, however, the reality remains that an after-the-fact definition of pollution control requirements is both slower and more cumbersome than what Congress had in mind.

on the FDF variance when confronted with countervailing factors which it had been "fully aware of" for nearly two years before completing the rulemaking. 43 Fed. Reg. 29771 (1978).[54] Likewise, in *American Iron and Steel Institute* v. *EPA*, 526 F.2d 1027, 1061 (3d Cir. 1975), modified, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978), EPA proferred the FDF variance in response to industry criticism of its data base, even though the flaw at issue had been clearly pointed out to EPA during the rulemaking. 39 Fed. Reg. 24114, 24115 (1974)(discussing sinter plants).[55]

In these situations, the FDF variance is nothing more than a fig leaf for inadequate agency rulemaking. This Court need not sanction such obviously flawed rulemaking. Congress wanted EPA to do an adequate job during rulemaking.[56] It told EPA to be "precise" with effluent guidelines so that effluent limits would be uniform and, hence, universally applicable. 1972 *Legis. Hist.*, *supra*, at 172, 309. The FDF variance thwarts this scheme.

In addition, reliance on the so-called "safety valve" of the FDF variance makes EPA's rules more, not less, vulnerable to challenge. EPA, in effect, puts its eggs in a basket it doesn't control. If a source contests the pretreatment standards on the merits rather than in a variance proceeding, EPA runs the risk that its rules will be overturned for failure to respond to relevant rulemaking comments. See, *e.g.*, *Portland Cement Ass'n.* v. *Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied 417 U.S. 921 (1974), reh. denied, 423 U.S. 1092 (1976). The weight of each rulemaking comment turns on its

[54] This flaw did not prove critical. *Kennecott* upheld the BPT standards, relying in large part, on the statutory obligation to base effluent guidelines on the "best plant," rather than on the availability of the FDF variance as a safety valve. 612 F.2d. at 1243.

[55] *AISI* accepted the adequacy of the FDF variance as a safety valve for this error in the *BPT* rules. *AISI* did not address FDF variances from BAT standards as the BAT rules at issue in *AISI* did not contain an FDF variance clause. 39 Fed. Reg. 24114-24130 (1974). Nor did *AISI* address Section 301(*l*), which it predated.

[56] Senator Muskie, for example, explained: "[T]here are no waivers or modifications ***. An adequate consideration of costs is made at the time of promulgation of the effluent guidelines". 1977 *Legis. Hist.*, *supra*, at 458.

validity, not on whether it is supported by few or many sources. Hence, it is far safer for EPA to be careful during, not after, the rulemaking.

A second type of error occurs when industry fails to bring relevant information to EPA's attention during a rulemaking. An FDF variance does not cure this type of error; it abets it. The variance gives industry an incentive to treat the rulemaking more casually. If a company fails to produce relevant information, it will have a second bite at the apple in a variance proceeding. Without the variance, industry must come forward with all relevant information during a rulemaking. Where it fails to do so, the courts will not entertain a challenge to the rule. *E.g.*, *Kennecott* and *AISI*.[57] In addition, EPA is not totally at industry's mercy. Congress gave EPA broad authority to obtain from industry whatever information it needs to issue pretreatment standards. Section 308, 33 U.S.C. 1318.

Finally, EPA can issue rules which become dated in the wake of new information. EPA does not need an FDF variance for these situations either. As EPA concedes, it already has authority—indeed, is required—to revise its rules when this occurs. Section 307(b)(2), 33 U.S.C. 1317(b)(2). In short, the FDF variance is at best useless and at worst positively detrimental to EPA's overall standard-setting effort.

d. EPA also claims that the Third Circuit's decision could disrupt implementation of the Act. It might, says EPA, endanger existing regulations, presumably because some companies will try to reopen rules issued in partial reliance on the availability of an FDF variance as a safety valve. (EPA Br. 37). There will, however, be few, if any, opportunities to do so. EPA's rules required plants to apply for their variance within 180 days of the effective date of a pretreatment standard. (Pet. App. A122, A124). By September 1983, the date of the Third Circuit's decision, only 12 companies had

[57] Both *Kennecott* and *AISI* rejected industry challenges based on information not presented to EPA during the rulemaking (*e.g.*, ferrocyanide formation, 612 F.2d at 1245; water scarcity, 526 F.2d at 1050; and engineering factors, 526 F.2d at 1049).

met the FDF variance application deadline.[58] These companies can still take advantage of any relevant information which could not have been brought to EPA's attention during the rulemaking. Section 509(b)(1), 33 U.S.C. 1369(b)(1).[59] The FDF variance, by contrast, could prove very disruptive since CMA forecasts that some companies will apply well beyond the 180 day application deadline in EPA's current rules—indeed, well after the deadline for complying with the applicable pretreatment standard. (CMA Br. 38, n.62).

EPA also claims that it may have to delay issuing future standards if it cannot rely on the FDF variance as a safety valve. (EPA Br. 37-38). This, too, is hyberbole. Since the Third Circuit's decision, EPA has issued six final[60] and four proposed pretreatment standards.[61] All were issued on or about the agency's deadline (*i.e.*, the date established in the Consent Decree).[62] Since EPA has apparently had no problem

[58] The filing deadline had expired for ten of thirteen pretreatment standards issued after EPA created the variance. These standards covered 11,316 (83%) of the 13,696 sources subject to categorical pretreatment standards. Of the 12 variance applicants, one company requested variances for two plants; another, for 24 plants. (Br. in Opp. App. A5-A7).

[59] An FDF variance is not subject to this restriction; it can cover any facts, including those which could easily have been brought to EPA's attention during a rulemaking. However, no useful purpose would be served—indeed it would delay enforcement of this program—to allow sources to raise new excuses for noncompliance from final rules. The restriction is therefore both wise and equitable, even as applied to the 12 companies possibly affected by the Third Circuit's decision.

[60] 48 Fed. Reg. 49126-49171 (Oct. 24, 1983) (aluminum forming); 48 Fed. Reg. 49808-49831 (Oct. 27, 1983) (pharmaceutical manufacturing); 48 Fed. Reg. 52380-52400 (Nov. 17, 1983) (coil coating); 48 Fed. Reg. 55690-55705 (Dec. 14, 1983) (electrical and electronic components); 49 Fed. Reg. 8742-8831 (Mar. 8, 1984) (nonferrous metals manufacturing); 49 Fed. Reg. 9108-9152 (Mar. 9, 1984) (battery manufacturing).

[61] 48 Fed. Reg. 49408-49436 (Oct. 25, 1983) (inorganic chemicals manufacturing); 49 Fed. Reg. 5862-5883 (Feb. 15, 1984) (plastics molding); 49 Fed. Reg. 8112-8182 (Mar. 5, 1984) (nonferrous metals and iron and steel/copper/aluminum metal power production and powder metallurgy); 49 Fed. Reg. 26352-26483 (June 27, 1984) (nonferrous metals manufacturing).

[62] EPA's deadlines are embodied in a consent decree entered into with NRDC and approved by the district court in 1976. See n 5, *supra*. Administrator Ruckelshaus signed all of the above-referenced standards within a month of this deadline and all but two within a week of the deadline. The standards appeared in the Federal Register shortly thereafter.

issuing rules in the absence of an FDF variance, there is no reason to believe it will develop a problem in the future. EPA has not, for example, had a problem issuing either new source performance standards or new source pretreatment standards, yet neither are eligible for an FDF variance.

Moreover, since few indirect dischargers avail themselves of the FDF variance, incorporating their concerns in the national rulemaking will not significantly burden EPA. This does not add a new feature to EPA rulemaking; EPA routinely considers unique features of individual plants in rulemaking for both direct and indirect dischargers, notwithstanding its desire to focus on the more "typical" plants. (EPA Br. 37). Indeed, requests to establish separate subcategories for one or a few plants which are somehow "different" from others in the same industrial category are a common feature of these rulemakings.[63] Eliminating the FDF variance simply closes off another avenue for raising the same concerns. It frees EPA to concentrate its resources on rulemaking, rather than dispersing them throughout variance proceedings and litigation over variance applications.

e. There are sound policy reasons for avoiding FDF variances. Understanding what makes one plant's performance different from others may be a key to improving the performance of all. Thus, considering this issue in the rulemaking may actually enhance the technology-forcing nature of the standard.

In addition, it is far more efficient to decide whether plants are different or similar to the rest of an industrial

[63] See, *e.g.*, *Association of Pacific Fisheries* v. *EPA*, 615 F.2d 794, 808 n.10 (9th Cir. 1980) (subcategories divided for analytical purposes into subdivisions of one, two, or three plants); *Kennecott Copper Corp.*, 612 F.2d at 1246 (subcategorization of two mills was arbitrary); *American Iron and Steel Institute*, 526 F.2d at 1050-1051 (addressed sole plant in country with water supply problem). Indeed, subcategorization has been one of the most frequently disputed issues in litigation over EPA's effluent limitations. Report of the Effluent Standards and Water Quality Information Advisory Committee, reprinted in *Implementation of the Federal Water Pollution Control Act, Hearings Before the Subcomm. on Investigations and Review of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. 197-208 (1976).

category during, not after, a rulemaking. During the rulemaking, the standard-setters can frame the options for decision when the data base is still fresh before them. By contrast, EPA's FDF variance procedures require state and regional enforcement personnel to make the same decisions on the basis of a rulemaking record which is unfamiliar to them. Their decisions, in turn, may be reviewed by the EPA regional office (if a state makes the decision), the Regional Administrator, or the Administrator. This, at best, duplicates efforts, wasting scarce agency resources. It also prolongs the period of uncertainty over pollution control obligations.

Experience with BPT requirements shows that once a plant files an FDF variance application, it enters a regulatory limbo. Plants which applied for an FDF variance from BPT requirements before 1980 are still awaiting EPA's decision.[64] Some of these applications date to 1976 and 1977. As long as EPA demurs, the applicants are unwilling to make the required capital expenditures for pollution controls. This creates inequity within regulated industries since companies which postpone pollution control expenditures gain a competitive edge over those which pay to install, operate, and maintain controls. Yet Section 301 was added to the law for the very purpose of eliminating such economic disparities. 1972 *Legis. Hist.*, *supra*, at 156.

Experience also shows that many variance applications lack merit,[65] a fact that weighed heavily with Congress.[66] Yet variance applications delay enforcement efforts. Congress rejected a proposal for case-by-case administrative extensions of the 1977 BPT deadline for this very reason. At the end of EPA's decision-making process, those denied a variance would "almost certainly" appeal to the courts, Congress

[64] Variance applications 76-09, 77-06, 77-14, 77-15, 77-16, 77-19, 78-02, 78-05, and 79-03 are still pending, according to EPA's June 29, 1984 status report.

[65] *E.g.*, EPA approved only four of the 53 BPT variance applications. Fourteen were denied; 16 withdrawn. The rest are still pending. 1983 *Hearings*, *supra*, at 2740.

[66] Congress repeatedly expressed the fear that variances would be pursued by unqualified sources in order to buy time for compliance. See, *e.g.*, 1977 *Legis. Hist.*, *supra*, at 452, 463-464, 683, 695, 860.

reasoned, perhaps obtaining a stay of the applicable requirements. This, in turn, would mean that "these discharges would continue unabated until final judicial resolution, first of the variance, and then, if necessary, of the ensuing enforcement order." 1977 *Legis. Hist.*, *supra*, at 860-862.[67] Indeed, Congress took a dim view of variances altogether:

> The conferees are aware of the administrative and judicial implications of modifications of a law as complex as the Clean Water Act. There was only one exception provided in the 1972 act and in that case, there had been great abuse. More than 100 steam electric powerplants applied for modification of thermal effluent limits. None have yet been placed on a compliance schedule to meet effluent limitations because of extensive delay as a result of this exception. And there is little question that after the administrative process there will be extensive litigation. Heat has become an unregulated pollutant, clearly not the intent of Congress. The Congress intended that there be a very limited waiver ***. That limited exception has been turned into a gaping loophole.

Id at 456-457, 641-642, 867. It therefore carefully circumscribed, through Section 301(*l*), the availability of variances where toxic pollutants are concerned.

Petitioners' construction of the Act ignores the clear language of Section 301(*l*), is inconsonant with the overall statutory scheme for strict control of toxics, and would give a handful of companies an unfair competitive advantage over the thousands of sources now embarking on a pollution control program. The Third Circuit correctly rejected it.

[67] EPA claims it is inconsistent to say that variances delay compliance even though few companies apply. (EPA Br. 35, n.26). There is no inconsistency. The fact that a source is subject to a pretreatment standard means that it is, by definition, a "significant" environmental problem. 1972 *Legis. Hist.*, *supra*, at 800. When that source delays compliance, it thwarts Congress's overall scheme for strict toxics control and gains a competitive advantage over others in the same industry who comply with the law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 20, 1984

APPENDIX

CLEAN WATER ACT PROVISIONS

1. Section 208(b)(2)(C) of the Clean Water Act, as amended, 33 U.S.C. 1288(b)(2)(C):

(2) Any plan prepared under such process shall include, but not be limited to—

* * *

(C) the establishment of a regulatory program to—

(i) implement the waste treatment management requirements of section 201(c),

(ii) regulate the location, modification, and construction of any facilities within such area which may result in any discharge in such area, and

(iii) assure that any industrial or commercial waste discharged into any treatment works in such area meet applicable pretreatment requirements.

2. Section 301(c) of the Clean Water Act, as amended, 33 U.S.C. 1311(c):

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

3. Section 301(g) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(g):

(g)(1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 304(a)(4) of this Act, toxic pollutants subject to section 307(a) of this Act, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time-period as he is eligible to apply for a modification under this subsection.

4. Section 301(h) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(h):

(h) The Administrator, with the concurrence of the State, may issue a permit under section 402 which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant in an existing discharge from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a)(6) of this Act;

(2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures

protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(8) any funds available to the owner of such treatment works under title II of this Act will be used to achieve the degree of effluent reduction required by section 201(b) and (g)(2)(A) or to carry out the requirements of this subsection.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a)(2) of this Act.

5. Section 301(i) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(i):

(i)(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time

required in such subsection, or (B) the United States has failed to make financial assistance under this Act available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1983, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act, section 307 of this Act, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this Act for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable

to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (l) of this subsection, but in no event shall it extend beyond July 1, 1983; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1983, and will meet the requirements to subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act, and the publicly owned treatment works to accept the discharge from the point source; and (iii)

the permit for such point source requires point source to meet all requirements under section 307(a) and (b) during the period of such time modification.

6. Section 301(j) of the Clean Water Act, as amended, 33 U.S.C. (Supp. V) 1311(j):

(j)(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) under subsection (h) of this section shall be filed not later than 270 days after the date of enactment of the Clean Water Act of 1977;

(B) subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 or not later than 270 days after the date of enactment of the Clean Water Act of 1977, whichever is later.

(2) Any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

7. Section 304(f)(1) of the Clean Water Act, 33 U.S.C. 1314(f)(1) (1972):

(f)(1) For the purpose of assisting States in carrying out programs under section 402 of this Act, the Administrator shall publish, within one hundred and twenty days after the date of enactment of this title, and review at least annually

thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

8. Section 306(b)(1) of the Clean Water Act, as amended, 33 U.S.C. 1316(b)(1):

(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;
paperboard, builders paper and board mills;
meat product and rendering processing;
dairy product processing;
grain mills;
canned and preserved fruits and vegetables processing;
canned and preserved seafood processing;
sugar processing;
textile mills;
cement manufacturing;
feedlots;
electroplating;
organic chemicals manufacturing;
inorganic chemicals manufacturing;
plastic and synthetic materials manufacturing;
soap and detergent manufacturing;
fertilizer manufacturing;
petroleum refining;
iron and steel manufacturing;
nonferrous metals manufacturing;

phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

9. Section 306(e) of the Clean Water Act, as amended, 33 U.S.C. 1316(e):

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

10. Section 307(a) of the Clean Water Act, as amended, 33 U.S.C. (& Supp. V) 1317(a):

Sec. 307(a)(1) On and after the date of enactment of the Clean Water Act of 1977, the list of toxic pollutants or combination of pollutants subject to this Act shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after the date of enactment of the Clean Water Act of 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achieveable for the applicable category or class of point sources established in accordance with section 301(b)(2)(A) and 304 (b)(2) of this Act. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected orga-

nisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standards (or prohibition) with such modifications as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 301(b)(2)(A) and 304(b)(2) for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after the date of enactment of the Clean Water Act of 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

11. Section 307(d) of the Clean Water Act, as amended, 33 U.S.C. 1317(d):

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

12. Section 308(a) and (b) of the Clean Water Act, as amended, 33 U.S.C. 1318(a) and (b):

(a) Whenever required to carry out the objective of this Act, including but not limited to (1) developing or assisting

in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this Act; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to State permit programs), and 504 of this Act—

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) the Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

(b) Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator

shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act or when relevant in any proceeding under this Act.

13. Section 501(a) of the Clean Water Act, as amended, 33 U.S.C. 1361(a):

Sec. 501. (a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act.

14. Section 509(b)(1) of the Clean Water Act, as amended, 33 U.S.C. 1369(b)(1):

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306,(B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under sections 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

Supreme Court, U.S.
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No. 83-1013
No. 83-1373

IN THE

Supreme Court of the United States

October Term, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR STATE OF NEW YORK *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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Question Presented for Review.

Whether the Court of Appeals for the Third Circuit correctly held that Section 301(1) of the Clean Water Act, 33 U.S.C. § 1311(1) prohibits the United States Environmental Protection Agency from granting variances from national pretreatment standards for toxic pollutants to indirect dischargers.

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Nos. 83-1013 and 83-1373

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NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for State of New York *Amicus Curiae*.

Opinion Below.

The opinion of the Court of Appeals for the Third Circuit is reported at 719 F.2d 624.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 20, 1983. The petition for a writ of certiorari in No. 83-1013 was filed on December 19, 1983. By order dated December 12, 1983, Justice Brennan extended the time to file a petition for a writ of certiorari in No. 83-1373 until February 17, 1984, and the petition was filed on that date. The petitions were granted, and the cases were consolidated on April 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved.

This case involves technology-based "pretreatment standards" under Section 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b) (1982). Section 301(b) of the Act, 33 U.S.C. § 1311(b) (1982), describes various effluent limitations and standards that dischargers of pollutants are required to achieve. The factors that the Environmental Protection Agency Administrator must consider in establishing effluent limitations and standards are set forth in § 304(b) of the Act, 33 U.S.C. § 1314(b) (1982). Sections 301(c) and (g) of the Act, 33 U.S.C. § 1311(c) and (g) (1982), authorize modifications of some of the § 301 limitations and standards. Section 301(l) of the Act, 33 U.S.C. § 1311(l) (1982), provides that the Administrator may not modify the requirements of § 301 for toxic pollutants.

The EPA regulation at issue in this case governing the establishment of "fundamentally different factors" ("FDF") variances is codified at 40 C.F.R. § 403.13 (1983), and in 1984 was amended to reflect the decision of the court below (49 F.R. 5132, Feb. 10, 1984).

Interest of *Amicus Curiae*.

When the Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, it provided for a national scheme to improve the nation's water quality. While the States remain free under the Act to promulgate stricter standards should they choose to do so, they remain dependent upon the United States Environmental Protection Agency ("EPA") to promulgate baseline national effluent limitations. When EPA creates an unauthorized variance procedure, Congress' intent that there be baseline uniformity in regulating discharges is denied. This frustrates the water quality goals of the Act, does violence to the federal-State partnership envisioned by Congress, creates economic inequities by giving some plants economic advantages over others, and carried to the extreme, promotes interstate conflict.

New York, like 30 other States, is not authorized by EPA to administer the fundamentally different factor ("FDF") variance EPA created for indirect dischargers of toxic pollutants. In addition, under EPA's regulations, New York and 30 other States have no formal role when a discharger requests a variance from EPA; they may not even be aware of the request. EPA's never-ending decision-making process on FDF variances for toxic pollutants operates as a disincentive to the timely installation of pollution control devices because plants applying for the variance defer such expenditures in the hope they may qualify for a variance and thus cut costs.

Such inequities, the State of New York suggests, were not only not contemplated by Congress in enacting and amending the Clean Water Act, but are contrary to Congress' intentions.

This brief is therefore submitted in support of the position urged by the respondent, the Natural Resources Defense Council, Inc. seeking affirmance of the decision below of the Third Circuit Court of Appeals.

Statement of the Case.

The Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, requires the United States Environmental Protection Agency to regulate two types of industrial dischargers: (1) "direct" dischargers, who discharge their wastewater directly into navigable waters, and (2) "indirect" dischargers, who discharge into municipally operated, publicly-owned treatment works, which in turn discharge their collective wastewaters into navigable waters. For both types of dischargers, EPA conducted rulemaking proceedings and promulgated national technology-based requirements applicable to categories of dischargers (e.g., metal finishing, electroplating). In each rulemaking proceeding, EPA inventoried industrial plants to gather information about the types and quantities of pollutants in a typical plant's wastewater and the costs and effectiveness of various wastewater treatment technologies prior to promulgating regulations.

EPA also, however, included a provision allowing an atypical plant to obtain a variance from the limits in a categorical standard where the plant made a satisfactory showing of factors "fundamentally different" from those considered by EPA in promulgating the regulations. This "fundamentally different factor" variance is theoretically

available to lower as well as raise a plant's limits (although there are no indications in the record of requests to lower the limits) and is available not only upon the request of a plant, but of "any interested person", including EPA (40 C.F.R. § 403.13(b)).

The variance mechanism is somewhat cumbersome. New York and 30 other States are not authorized by EPA to grant or deny requests for variances from the pretreatment standards. Variance requests must be filed with the EPA, and the public is invited to comment (40 C.F.R. § 403.13(g), (j)). The EPA Enforcement Division Director then decides whether to grant or deny the variance (40 C.F.R. 403.13(1)). After his decision is issued, any interested person may petition the EPA Regional Administrator for a hearing within 30 days of the EPA Enforcement Division Director's decision (40 C.F.R. § 403.13(m)(1)), and if the petition is denied, the denial may be appealed to the EPA Administrator himself (40 C.F.R. § 403.13(m)(2)).

Experience has shown that once a plant files for an FDF variance, compliance with the Clean Water Act is deferred to some uncertain future date. Some applications, still undecided, date from 1976. Not surprisingly, while this process is going on, plants are unwilling to make substantial capital investments in expensive pollution control devices because there exists the hope that a variance will be issued and that the expenditure may not be necessary.

Summary of Argument.

By its express terms, Section 301(1) of the Clean Water Act prohibits the issuance of a variance for indirect dischargers of toxic pollutants. It is reasonable to assume that Congress, which expressly included several provisions authorizing variances relating to conventional, *i.e.*, non-

toxic, pollutants in other sections of the Clean Water Act, enacted the prohibition barring variances for toxic pollutants in Section 301(l) because it chose to treat toxic pollutants differently.

EPA's argument that the ban against variances applies to some variances but not to the FDF variances at issue is inconsistent with the broad language of the ban and Congress' historic treatment of toxic pollutants under the Clean Water Act.

EPA's argument that the ban must be read flexibly in its favor or, conversely, rigidly to prohibit any amendment or revision of effluent limitations or standards in the absence of rule-making must be rejected because a reasonable construction which accords with the statute's express terms and intent is available.

ARGUMENT.

Section 301(1) of the Clean Water Act prohibits the issuance of FDF variances for indirect dischargers of toxic pollutants.

Section 301(1) of the Clean Water Act was enacted by Congress in 1977 and provides:

> The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a)(1) of this title.

This is in stark contrast to Sections 301(c) and (g) of the Clean Water Act which expressly authorize variances:

(c) The Administrator may modify the requirements of subsection (b) (2) (A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

• • •

(g) (1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b) (2) (A) of this section with respect to the discharge of any pollutant (*other than* pollutants identified pursuant to section 304(a) (4) of this title, *toxic pollutants* subject to section 307(a) of this title, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b) (1) (A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection. (Emphasis added).

Had Congress wished to authorize a variance from toxic pollutants for indirect dischargers, it certainly had the opportunity. Instead, it chose to prohibit such variances and plainly said so. The Third Circuit had no difficulty with this rationale. As that Court pointed out, Congress has always treated toxic pollutants specially under the Act (719 F.2d at 645). Indeed, the ban against variances for toxic pollutants is the only express ban against variances in the entire Act.

The reasoning this Court applied in *E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 138 (1977) is equally appropriate here:

> *In striking contrast to § 301(c), there is no statutory provision for variances, and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and "maximum feasible control of new sources."* 430 U.S. at 138 (emphasis added).

Congress' intention to insure national uniformity is counter-manded by creation of an FDF variance.

EPA's argument that the ban against variances for toxic pollutants applies not to FDF variances but only to those authorized by Sections 301(c) and (g)—based on economics or the high quality of waters receiving the discharge—is belied by the broad terms of the prohibition in Section 301(1). It is nothing more than an argument of convenience for the administrators and does not reflect Congress' intention—or most obviously—Congress' words.

EPA's argument that a "literalistic" reading of the ban would mean that EPA could never revise effluent limitations and pretreatment standards for toxic pollutants even if it discovered errors in its analysis goes too far. The ban does not prohibit EPA from amending or revising nationally-uniform limitations or standards within a rulemaking context; such amendments or revisions would still provide for national uniformity, rather than for case-by-case exceptions administered on a regional rather than national basis, some by mere default for years, as the FDF variance procedure does now.

New York strongly disagrees with EPA's argument that a rule-making proceeding and the FDF variance procedure would achieve the same substantive result. Rule-making achieves national uniformity in accordance with the goals of the Clean Water Act, while individual plant-by-plant determinations made by regional, not national, EPA personnel under the FDF variance procedure do not.

It is significant that Senator Edmund S. Muskie, acknowledged by this Court in *du Pont* as "perhaps the Act's primary author" (430 U.S. at 129) used the terms "modification" and "variance" interchangeably during the Senate floor debate, on the 1977 amendments (A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong., 2d Sess. [1978]). His understanding of the meaning of the term "modification", and his explanation to his colleagues, who presumably relied upon it, is clear: modification means variance, not rule-making. And as this Court also stated in *du Pont,* Senator Muskie also "emphasized the importance of uniformity in setting § 301 limitations. He explained that this goal of uniformity required that EPA focus on classes or categories of sources in formulating effluent limitations" (430 U.S. at 129). EPA's FDF variances which create plant-by-plant rather than categorical exceptions are inconsistent with Senator Muskie's representations. Senator Muskie's statements, given his unique role in obtaining passage of the legislative provisions at issue here, are entitled to significant weight. Thus, EPA's argument that a literal interpretation is required should be rejected because it would lead to an unreasonable result, and that would be inconsistent with elementary principles of statutory construction.

CONCLUSION.

For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit should be affirmed.

Dated: August 20, 1984

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MOTION FILED

AUG 20 1984

Nos. 83-1013 and 83-1373

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OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents;

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE SOUTHEASTERN FISHERIES ASSOCIATION, INC.

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August 1984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1013

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
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MOTION OF THE SOUTHEASTERN FISHERIES ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

a. The Southeastern Fisheries Association, Inc. ("SFA") hereby moves for leave to file the attached brief *amicus curiae* in support of Respondents, pursuant to Supreme Court Rule

36.3. Petitioner Environmental Protection Agency ("EPA") and Respondent Natural Resources Defense Council, Inc. have consented to the filing of this brief. Their consent letters have been filed with the Clerk of this Court. The consent of Petitioner Chemical Manufacturers Association could not be obtained.

SFA is one of the oldest and largest commercial fisheries trade associations in the Southeastern United States. Organized in 1952 under the laws of the State of Florida, it is headquartered in Tallahassee, Florida. SFA has more than 400 members in all sectors of the commercial fishing industry from North Carolina to Texas. In addition to those directly involved in harvesting fishery resources, its members include processors, dealers, distributors, and suppliers to the fishing industry.

The Gulf and South Atlantic fisheries are among the Nation's most valuable. Shrimp, the major species from the region, is the highest value catch in the country, with landings in 1983 valued at approximately $486 million.[1] The total national economic impact of the South Atlantic and Gulf of Mexico commercial fisheries, including direct and indirect sales, was over $6 billion in 1980. Income related to this economic activity resulted in 142,854 person-years of employment.[2]

Protection of coastal waters and estuarine habitat is critical to the livelihood of SFA's members. Over 90 percent of the commercial fishery resources in the Southeastern United States is estuarine-dependent. Degradation of the Nation's marine and coastal waters could not only lead to decline in the overall productivity of the Gulf and South Atlantic fisheries, but to a decline in quality of fishery products, with substantial adverse effects on the economics of the industry.

[1] U.S. Department of Commerce, National Marine Fisheries Service, Fisheries of the United States, 1983, p. 11 (April 1984).

[2] Centaur Associates, Inc., Economic Impact of the Commercial Fishing Industry in the Gulf of Mexico and South Atlantic Region, p. 150 (Feb. 1984).

b. This case involves whether the Third Circuit correctly ruled that Section 301(l) of the Clean Water Act[3] precludes industrial facilities from increasing their discharges of toxic pollutants over those allowed in uniform national pretreatment standards by obtaining a "fundamentally different factor" variance. *National Association of Metal Finishers* v. *EPA*, 719 F.2d 624, 645-646 (3d Cir. 1983).

The discharge of toxic pollutants into the Nation's marine waters and estuaries is of special concern to SFA because of the threats posed by toxics to fisheries. Toxic pollutants, such as mercury and lead, are known to harm reproduction of aquatic species, including shrimp and oysters. These pollutants, and others such as copper and PCB's, bioconcentrate in the food chain, where commercial fish and shellfish are near the top. Bioconcentration over time can render valuable species, such as tuna and swordfish, unfit for human consumption.[4]

There are, of course, numerous industrial facilities in the Southeast which discharge, both directly or indirectly through publicly owned treatment works, into the waters on which SFA members depend for their livelihood. Variances have already been sought for plants located in the Gulf Coast states, including chemical, fertilizer, and electroplating facilities. Moreover, pretreatment standards have yet to be issued, or were recently issued, for several of the major industries with the potential to affect SFA members, including over 200 organic chemical or plastics manufacturers concentrated in Texas, Louisiana, Alabama, Florida, and Mississippi, and numerous petroleum refineries located along the Gulf. If the Third Circuit is reversed, and it is held that EPA has the power to grant variances, each of these facilities would be potentially eligible to dump more toxic pollutants into the fisheries than are allowed by the uniform national standards.

In sum, SFA and its members have a keen interest in

[3] 33 U.S.C. §1311(l).

[4] See generally Environmental Protection Agency, Ambient Water Quality Criteria for Copper, B-10, 12; Ambient Water Quality for Mercury, B-6, 7, C-20, 21; Ambient Water Quality for Lead, B-9; Ambient Water Quality for Polychlorinated Biphenyls, B-6 (EPA Series 440/5-80, October 1980).

assuring that the Clean Water Act is properly implemented to reduce toxic pollutant discharges into the waters of the Southeastern United States. This special interest in the protection of fishery resources and habitat is not represented in this proceeding.

Respectfully submitted,

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NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
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On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR AMICUS CURIAE SOUTHEASTERN FISHERIES ASSOCIATION, INC.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Southeastern Fisheries Association, Inc. ("SFA") respectfully refers this Court to the foregoing Motion for

Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding. This brief is filed in support of Respondents.

INTRODUCTION

This case reviews a decision by the Third Circuit holding that Section 301(l) of the Clean Water Act[1] bars the Environmental Protection Agency from granting "fundamentally different factor" ("FDF") variances from uniform national pretreatment standards for toxic pollutants. The foundation of the Third Circuit's decision was its view that a key purpose of the 1977 Amendments to the Clean Water Act, as evidenced by the legislative history, was to crack down on the discharge of toxic pollutants. *National Association of Metal Finishers v. EPA*, 719 F.2d 624, 645-646 (3d Cir. 1983).

More specifically, the threat to the Nation's fisheries played a major role in persuading Congress to spotlight toxics control in the 1977 Amendments. During the Senate debate, Senator Muskie, the principal author of the toxics control provisions, focused on fish kills and the presence of toxics in the aquatic environment. He warned that "concentrations of one or more of the heavy metals commonly exceeded suggested safe limits in the water column or in fish tissue at 17 sites," or 41 percent of those surveyed.[2]

Similarly, in discussing the Conference Report on the floor of the House, Congressman Roberts, the floor manager, emphasized that toxic pollutants not only "destroyed both commercial and sport fishing, but in many major water bodies they also constitute a hazard to aquatic environment and public health that has yet to be fully recognized." 1977 Legis. Hist at 327.

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[1] 33 U.S.C. §1311(l).

[2] See A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong, 2d Sess., 863-864 (1978) (hereafter cited as "1977 Legis. Hist.").

ARGUMENT

THE CLEAN WATER ACT, AND PARTICULARLY THE 1977 AMENDMENTS, WERE DESIGNED TO RID THE NATION'S WATERS OF TOXIC POLLUTANTS, AND SHOULD BE CONSTRUED TO FOSTER THIS PURPOSE

From the outset, the Clean Water Act established a "national policy that the discharge of toxic pollutants in toxic amounts be prohibited. . . . " 33 U.S.C. §1251(a)(3). To achieve this goal, Congress initially established a separate procedure aimed at assuring more stringent effluent standards for toxic pollutants, and required that these toxic standards "provide an ample margin of safety," 33 U.S.C. §1317(a)(4)—a directive not applicable to other pollutants.

Nevertheless, little progress had been made in regulating toxic pollutants by the time Congress reexamined the Clean Water Act in 1977.[3] This, combined with mounting evidence of the harm caused by toxic chemicals in the environment, prompted Congress to make stringent and effective control of toxics a centerpiece of the 1977 Amendments.

Congressman Roberts called the toxics provisions "the highlight of this bill," and underscored "the increasingly evident toxics hazard." 1977 Legis. Hist. at 326. Senator Muskie cautioned that "the seriousness of the toxics problem is just beginning to be understood," and that "the nature of the toxics problem is so pervasive that the most effective approach in dealing with it is on an industry-by-industry basis." *Id.* at 863. Finally, in signing the 1977 Amendments, President Carter praised the bill for emphasizing "the importance of controlling toxic pollutants which endanger the public health." *Id.* at 181.

The Third Circuit's decision was faithful to this legislative history. Indeed, the Court began its discussion of the meaning of §301(l) by observing that "the elimination of the discharge of toxic pollutants has always received special emphasis under

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[3] See R. Hall, The Evolution and Implementation of EPA's Regulatory Programs to Control the Discharge of Toxic Pollutants, 10 Nat. Res. Law 507, 514-515(1977).

the Act," and that "the discharge of toxic pollutants generated even greater Congressional concern in 1977." 719 F.2d at 645.

Ultimately, the Third Circuit ruled:

> Given the clear congressional concern throughout the 1977 Amendments for discharges of toxic pollutants, we hold that the FDF variances for toxic pollutant discharges are forbidden by the Act.

719 F.2d at 646.

The overall purpose of the legislation is, of course, the appropriate context in which to examine the meaning of Section 301(l)'s ban on modifications of toxic pollutant requirements. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Weinberger* v. *Hynsan, Westcott, & Dunning, Inc*, 412 U.S. 609, 631-632 (1973).

EPA's reading of Section 301(1) flouts Congress' overriding purpose in enacting the 1977 Amendments. By contrast, the Third Circuit's ruling protects the aquatic environment and human health by compelling industrial dischargers to meet national uniform pretreatment standards without modification.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit should be affirmed.

Respectfully submitted,

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No. 83-1013

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL MANUFACTURERS ASSOCIATION,
AMERICAN CYANAMID COMPANY,
FMC CORPORATION, AND
UNION CARBIDE CORPORATION,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decision below of the United States Court of Appeals for the Third Circuit reflects a basic misunderstanding of the difference between a "fundamentally different factors" ("FDF") variance and a modification of an applicable effluent limitation or standard under §§ 301(c) and (g) of the Clean Water Act. 33 U.S.C. §§ 1311(c) and (g) (1984). The Natural Resources Defense Council, Inc. ("NRDC") shares this misunderstanding. Unlike §§ 301(c) and (g) modifications, FDF variances serve a function in the development of effluent limitations and standards that is entirely consistent with the intent of Congress that similar plants meet similar

effluent limitations and standards, and that such limitations and standards not be "modified" for toxic pollutants. Section 301(l) of the Act, 33 U.S.C. § 1311(l) (1984), was not intended to bar FDF variances for toxic pollutants. Section 301(l) was also never intended to regulate the procedures by which the Environmental Protection Agency ("EPA") promulgates effluent limitations and standards. Yet that is exactly what would result if NRDC's interpretation of § 301(l) were to prevail. Finally, there are convincing policy justifications for an FDF variance regulation, contrary to NRDC's assertion that no such justifications exist.

I. FDF Variances Are Entirely Different From Modifications Barred By § 301(l) Of The Act.

The nature and purpose of the FDF variance regulation is central to the merits, and we thus begin with this key issue.

NRDC argues that FDF variances and modifications under § 301(c) of the Act "serve the identical function" and that accordingly "[i]t makes no sense to assume that Congress prohibited one, and not the other, for toxics." (NRDC Br. at 32). This assertion is patently incorrect. FDF variances and §§ 301(c) and (g) modifications of effluent limitations and standards serve completely different functions. It is entirely reasonable for Congress to have barred §§ 301(c) and (g) modifications for toxic pollutants, without intending to affect the applicability of FDF variances to such pollutants.

An FDF variance is *not* an exception to an otherwise applicable effluent limitation or standard regulation. It is a determination that a plant is fundamentally different from the other plants in the industry in one or more

ways that were not taken into account by EPA in developing the industry regulations, and therefore that the regulations cannot lawfully be applied to the plant. EPA thus determines, by applying the appropriate factors set out in § 304 of the Clean Water Act, 33 U.S.C. § 1314 (1984), what limitations or standards the fundamentally different plant must achieve. The effect of this FDF procedure is to create within the industry regulations a new subcategory that includes the fundamentally different plant. (*See* Pet. Br. at 8).

The fact that one or more factors peculiar to a plant were not considered by EPA in developing the industry regulations is not, as NRDC suggests (NRDC Br. at 10), the result of incompetence by EPA or malfeasance by the particular plant. EPA's effluent limitations and standards for a single industry category may cover literally thousands of plants, each with its own design, process or combination of processes, and plant configuration. Even though EPA has the authority under § 308 of the Act, 33 U.S.C. § 1318 (1984), to obtain data from plants that it intends to regulate, it is impossible to collect and evaluate all of the data that might possibly be relevant from all of the plants that might be covered by a regulation, particularly within the time limits imposed by §§ 301 and 304 of the Act and by the courts[1] for promulgation of effluent limitations guidelines and standards. Likewise, it is impossible for plants to know about, and therefore to submit to EPA, all of the data that may prove to be

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[1] NRDC v. Train, 8 E.R.C. 2120 (D.D.C. 1976), *modified sub nom.* NRDC v. Costle, 12 E.R.C. 1833 (D.D.C. 1979), *modified sub nom.* NRDC v. Gorsuch (D.D.C. October 26, 1982), *modified sub nom.* NRDC v. Ruckelshaus, Nos. 2153-73 *et al.* (D.D.C. Aug. 2, 1983, Jan. 6, 1984, and July 5, 1984).

relevant in the development of regulations that will apply to the plant.

It is therefore inevitable that EPA will occasionally fail to collect or to consider pertinent data relating to a particular "fundamentally different" plant. As a result, EPA's industry-wide regulations will be defective as to that plant. FDF variances provide a mechanism by which EPA may correct a flaw in its regulations with respect to a particular plant, a flaw which might otherwise lead a reviewing court to set aside the regulations in whole or in part.[2] The FDF mechanism thus furthers the goals of the Clean Water Act by allowing implementation of the effluent limitations and standards for the industry to proceed without delay resulting from a defect in the regulations with respect to one or a few plants.

When a plant receives an FDF variance, it is therefore not *exempted* from applicable requirements. Rather, EPA applies the factors set forth in § 304 of the Act to determine what requirements are applicable to the fundamentally different plant. Absent an FDF variance, the plant would be in a position to challenge the lawfulness of the application to it of the industry regulations. This is not the case for dischargers who receive a modification of limitations or standards under §§ 301(c) and (g) of the Act. Such dischargers are exempted from meeting industry-wide effluent limitations and standards even though EPA considered all of the relevant factors for those plants in developing the regulations and there is no

[2] *See*, EPA v. National Crushed Stone Association, 449 U.S. 64, 77-78 (1980); Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1244 (10th Cir. 1979); Weyerhaeuser v. Costle, 590 F.2d 1011, 1040-41 (D.C. Cir. 1978).

fundamental difference between those dischargers and other plants within the industry as to those factors.

The distinction between FDF variances and modifications under §§ 301(c) and (g) of the Act is apparent when one examines the bases on which variances and modifications may be granted. EPA's pretreatment regulations specify the factors that may be considered in determining whether a plant is fundamentally different, as well as the factors that may not be considered. The factors that may be grounds for receiving an FDF variance include the quality of a discharger's raw waste load and the processes that the discharger employs.[3] The factors that may *not* be the basis for an FDF variance include "the [discharger's] ability to pay for the required waste treatment" and "the impact of a Discharge on the quality of the POTW's receiving waters."[4] These two factors which *may not* be considered as the basis for an

[3] 40 C.F.R. § 403.13(d) (1983). It is not enough for a discharger to prove that it is fundamentally different in one of the ways specified by EPA. A discharger must *also* prove that because it is fundamentally different, it will suffer a pollutant removal cost wholly out of proportion to the cost considered by EPA in developing the industry regulations or a non-water quality environmental impact fundamentally more adverse than the impact considered by EPA. 40 C.F.R. § 403.13(c)(2) (1983). Thus NRDC's focus on the "wholly out of proportion" cost test (NRDC Br. at 54) is misplaced. An individual discharger's cost is *not* a basis for an FDF variance. By taking cost into account once a discharger has demonstrated that it is fundamentally different in ways other than its costs, EPA's FDF variance regulation ensures that the Agency does not receive FDF variance applications from dischargers that may be fundamentally different from the industry but that can meet the industry standards without incurring significantly different costs from the rest of the industry.

[4] 40 C.F.R. § 403.13(e) (1983).

FDF variance are the very bases—and indeed the only bases—on which modifications under §§ 301(c) and (g) *may* be granted. Moreover, these two factors—an individual discharger's ability to pay and water quality impacts—are *not* factors that EPA takes into account in establishing "best available technology" ("BAT") effluent limitations or pretreatment standards. Thus, §§ 301(c) and (g) modifications are not, as NRDC claims (NRDC Br. at 31), a reexamination of BAT factors for an individual source. Instead, both are exemptions from clearly applicable limitations and standards based upon considerations that had nothing to do with the formulation of the limitations and standards.

Sections 301(c) and (g) waivers are entirely different from FDF variances. It is accordingly not at all difficult to understand why Congress chose in § 301(l) of the Act to disallow §§ 301(c) and (g) waivers for toxics, while at the same time leaving intact FDF variances for toxic pollutants.

II. This Court Has Recognized The Unique Function Of FDF Variances.

This Court well described the difference between FDF variances and §§ 301(c) and (g) modifications in *EPA* v. *National Crushed Stone Association, supra*, 449 U.S. 64. In that case, respondents argued that EPA's FDF variance regulation should allow a discharger to obtain a variance from "best practicable technology" ("BPT") regulations if the discharger could not afford to meet the BPT requirements. This argument was based in part on the fact that Congress authorized such an economic-capability waiver of BAT requirements in § 301(c) of the Act. This Court had no difficulty distinguishing between FDF variances and § 301(c) economic-capability

waivers. The Court noted that the FDF variance "is an acknowledgment that the BPT limitation was set without reference to the full range of current practices, to which the Administration was to refer." *Id.* at 77-78. In such circumstances, the Court stated, the limitation "is incomplete." *Id.* at 77. The Court contrasted this with a modification based upon a discharger's economic capability, which "would not have this character." *Id.* The Court noted that a § 301(c) waiver would allow a discharger to obtain less stringent limitations "simply because the point source could not afford a compliance cost that is not fundamentally different from those EPA already considered." *Id.* Thus, the Court cited with approval EPA's statement that a variance is not an exception to BPT or BAT limitations, but rather establishes an individualized BPT or BAT limit. *Id.* at 79 n.18.

NRDC argues that this Court's decision in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) ("*du Pont*"), disallowing FDF variances for new sources is "equally applicable to pretreatment standards." (NRDC Br. at 13). This is simply not the case. This Court's decision in *du Pont* regarding new sources is not at odds with the Court's subsequent holding in *EPA* v. *National Crushed Stone Association, supra*, 449 U.S. 64, that FDF variances from BPT regulations for existing sources cure regulations that are otherwise "incomplete." New sources are quite different from existing sources in a way that NRDC appears to misunderstand. NRDC states (NRDC Br. at 14 n.18) that "[n]ew sources can be just as variable in their processes as existing sources" and that this variability "is more difficult to anticipate in a rulemaking because the companies which will be affected and the processes they will seek to construct may not yet be

identifiable." This misses the point entirely. Section 306 of the Act, 33 U.S.C. § 1316 (1984), defines a "new source" as one which begins construction after the publication of proposed new source standards. Thus, new sources will know before they begin construction the requirements that they may be or are expected to meet. New sources accordingly can be designed and constructed to meet those new source standards, as Congress well recognized.[5] This is not the case with existing sources that must be retrofitted to meet requirements imposed on them years, or even decades, after they were designed and constructed. It is therefore far more critical for existing sources than for new sources that the variability among plants be fully reflected in EPA's effluent limitations and standards. The FDF variance for existing sources ensures that this variability will be taken into account.

NRDC's argument as to a Congressional desire for uniformity provides no basis for distinguishing pretreatment standards from BPT and BAT limitations. Section 307(b) of the Act, 33 U.S.C. § 1317(b) (1984), allows a publicly-owned treatment works ("POTW") to modify pretreatment standards on a case-by-case basis to take into account the removal of pollutants by the POTW. Thus, a chemical plant discharging to a POTW that

[5] In discussing § 306 of the Act, the Senate Report on the 1972 legislation noted, "The overriding purpose of this section would be to prevent *new* water pollution problems, and toward that end, maximum feasible control of new sources, *at the time of their construction*, is considered by the Committee to be the most effective and, in the long run, the least expensive approach to pollution control." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Committee on Public Works, Serial No. 1, 93d Cong., 1st Sess. 1476 (1973) ("1972 Legis. Hist.").

removes a high percentage of a toxic pollutant may be able to discharge twice as much of the pollutant as a plant discharging to a less efficient POTW. As a result of these so-called "removal credits," which differ from one POTW to the next, there will be little or no uniformity in the pretreatment standards that dischargers in an industry category must meet.[6] These modifications of pretreatment standards by POTWs also distinguish such standards from new source standards since, as this Court noted in *du Pont*, Congress authorized no modifications of new source standards.

NRDC argues that pretreatment standards must be treated like the new source standards because Congress used the word "standards" in both contexts. (NRDC Br. at 13). As noted in our brief (Pet. Br. at 21 n.22), the fact that Congress used the word "standard" in the context of new source and pretreatment requirements and the word "limitations" elsewhere is of no significance. NRDC itself quite rightly pointed out in its brief in *du Pont* that § 316 of the Act, 33 U.S.C. § 1326 (1984), uses the word "standards" when it is clear that Congress was referring to effluent limitations, and Congress itself referred to the setting of "standards" pursuant to §§ 301 and 306 of the Act. Brief for Natural Resources Defense

[6] Congress authorized removal credits "in order to avoid treatment for treatment's sake." *A Legislative History of the Clean Water Act of 1977*, Committee on Environmental and Public Works, Serial No. 14, 95th Cong., 2d Sess. 343 (1978). Congress recognized that by authorizing such credits, pretreatment standards would be revised for an "individual source or individual classes of sources" on a case-by-case basis by owners or operators of POTWs. *Id.* at 403, 461-62.

Council, Inc. as *Amicus Curiae* at 39 n.104, *du Pont*, *supra*.[7]

Contrary to NRDC's claim, it is also of no significance that pretreatment, like new source, standards may require "no discharge" since BPT limits in some cases also have required no discharge. The fact that it is unlawful for any owner or operator to operate any source in violation of a pretreatment or new source standard is similarly of no consequence, since § 301 of the Act makes it unlawful for any person to discharge a pollutant in violation of BPT and BAT effluent limitations.

Thus the reasons set forth by this Court in *du Pont* for disallowing FDF variances for new sources do not apply to FDF variances from BPT, BAT or pretreatment requirements. The decision in *du Pont* disallowing FDF variances for new sources should accordingly be limited to new sources, which can be designed and constructed to meet EPA's new source standards.

III. Establishing Different Limits And Standards For Atypical Plants Is Consistent With The Act.

Our opening brief explained why FDF variances for fundamentally different plants are supported by the Act, and why § 301(l) of the Act was not intended to bar FDF variances for toxic pollutants. (Pet. Br. at 17-34). NRDC's arguments to the contrary are not persuasive.

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[7] Moreover, since FDF variances were not adopted by EPA until after Congress enacted the Clean Water Act in 1972, Congress could not possibly have intended by its choice of the words "limitations" and "standards" in the 1972 Act to allow FDF variances for BPT or BAT limitations, while disallowing such variances from pretreatment and new source requirements.

NRDC cites the legislative history of the Act as evidence that, with the sole exception of § 301(c), Congress wanted uniform national requirements for BAT, and hence for pretreatment requirements which are similar to BAT. (NRDC Br. at 12). The legislative history in fact demonstrates that different plants must be treated differently. Congress never intended dissimilar plants to be subject to similar discharge requirements. Congress stated in 1972 that "*similar* point sources with *similar* characteristics ... [must] meet *similar* effluent limitations."[8] The issue is thus not uniformity *per se*, as NRDC would have this Court believe, but rather uniformity among similar plants. Different plants may be subject to different effluent limitations and standards under §§ 301, 304 and 307 of the Act, because these provisions of the Act direct EPA to take into account a number of factors which may vary from plant to plant. (*See* Pet. Br. at 5, 17-18).

In a perfect world, EPA could consider all relevant statutory factors during a rulemaking to establish industry-wide effluent limitations and standards, and divide an industry category into as many subcategories as necessary to reflect the differences among plants. This is not a perfect world, however. EPA has therefore adopted a mechanism—the FDF variance—to achieve the same end result as subcategorization would achieve.

As noted in our brief (Pet. Br. at 35-40), even NRDC concedes that a subcategory may be created for a single plant. NRDC's attempt in its brief (NRDC Br. at 32-39) to distinguish subcategorization from FDF variances fails to deal with the fundamental point, namely that

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[8] 1972 Legis. Hist., *supra*, at 309 (emphasis added).

EPA could accomplish by subcategorization the very same result that NRDC claims is barred by § 301(l), namely the promulgation of limits that apply only to a single plant. And EPA could do this without running afoul of any intent or directive of Congress. As the passage from the legislative history quoted by NRDC notes (NRDC Br. at 33), effluent limitations were intended to be "*as uniform as possible*,"[5] not uniform without regard to differences among plants. The passages that NRDC quotes from the legislative history (NRDC Br. at 33) are not to the contrary. No one is arguing that Congress intended individual factors addressed in the industry rulemaking to be taken into account again when applicable effluent limitations or standards are applied to a plant (NRDC Br. at 33); this is not the function of an FDF variance. Similarly, no one is arguing that Congress intended to require EPA to reconsider on a plant-by-plant basis the economic impact of a set of limitations or standards (NRDC Br. at 33); this is also not the function of an FDF variance. Congress did not, however, intend that EPA ignore fundamental differences among plants in the establishment of industry-wide limitations and standards. The very legislative history quoted by NRDC (*see* p. 11, *supra*) concerning the need to treat only similar plants similarly makes this point clear.

Perhaps recognizing the weakness of its effort substantively to distinguish subcategorization from FDF variances, NRDC turns to arguments about the difference in the timing and procedures used to adopt subcategories and FDF variances. (NRDC Br. at 35-37). There is no legislative history to support NRDC's argument

[5] 1972 Legis. Hist., *supra*, at 172 (emphasis added).

that in adopting § 301(l), Congress was concerned either about the timing of or procedures for granting variances; it was instead concerned about substance.

In light of the fact that—in substance—an FDF variance is merely the creation of a new subcategory for the fundamentally different plant, it is impossible to believe that Congress would allow, and indeed require, EPA to take differences among plants into account in establishing industry regulations while at the same time barring EPA from granting an FDF variance subsequently to take into account the differences it overlooked in establishing the industry regulations.

IV. Congress Did Not Intend To Bar FDF Variances For Toxic Pollutants.

There is no evidence that in adopting § 301(l), Congress intended to bar FDF variances for toxics. In fact, the legislative history indicates that § 301(l) was not intended to affect FDF variances at all.

NRDC states several times that the 1977 Clean Water Act legislative history "confirms that Congress intended to ban all variances for toxic pollutants." (NRDC Br. at 8; *see also, id.* at 16, 20). NRDC then cites to the use in the legislative history of the words "modification" and "variance" interchangeably (NRDC Br. at 15-16). In seeking to minimize the statement of Congressman Roberts, however, that § 301(l) would bar §§ 301(c) and (g) waivers for toxic pollutants, NRDC claims that "Congressman Roberts had no reason to list other examples of variances prohibited by Section 301(l) [because] Congress did not believe other variances were authorized." (NRDC Br. at 21). This statement directly contradicts NRDC's assertions that Congress intended in 1977

specifically to bar FDF variances for toxic pollutants. It is axiomatic that Congress could not have been unaware of FDF variances while at the same time specifically intending to limit EPA's ability to use such variances.

But Congress was aware of FDF variances. It was certainly aware of this Court's very important decision in *du Pont*, which held that BPT limitations could be established on a category-by-category basis *only* if a provision was made to deal with fundamentally different plants (Pet. Br. at 32), and NRDC itself had testified before Congress that a "fundamental variance provision" was integral to the Act's system of "national, uniform, minimum effluent limitations."[10] It is irrelevant that EPA may not have applied the FDF variance to BAT or pretreatment standards prior to 1977. What is of critical importance in understanding the intent of Congress in adopting § 301(l) is that EPA *had allowed FDF variances* from BPT regulations *for toxic pollutants*. (*See* EPA Br. at 30 and n.21-22). As NRDC points out, Congress focused heavily on the control of toxics in the 1977 amendments to the Clean Water Act. If Congress intended to upset an existing EPA practice and to disallow FDF variances for toxic pollutants, it would have expressly so stated. Yet there is no evidence that Congress intended in any way to alter EPA's regulations authorizing FDF variances for toxic pollutants. NRDC tries to rationalize this by claiming (NRDC Br. at 27) that it is not significant that Congress did not direct EPA to "[wring] more out of BPT for a few plants" by

[10] *See Federal Water Pollution Control Act Amendments of 1977*, Hearings before the Subcommittee on Environmental and Public Works, 95th Cong., 1st Sess., Serial No. 95-H25, Part 9, at 37 (1977).

disallowing FDF variances from BPT regulations. This misses the point entirely. Once NRDC concedes, as it appears to have done (NRDC Br. at 26-27), that § 301(l) did *not* direct EPA to disallow FDF variances from *BPT* regulations for toxic pollutants, then it has conceded that § 301(l) was *not* in fact intended to bar *all* variances for toxics, as NRDC elsewhere claims in its brief (NRDC Br. at 8).[11] If § 301(l) was not intended to bar FDF variances from BPT regulations for toxics, then § 301(l) cannot be read literally. (*See* EPA Br. at 24-27). The issue is thus which variances Congress intended to prohibit in § 301(l). The answer to that is clear. The legislative history of § 301(l) indicates that Congress only intended § 301(l) to apply to §§ 301(c) and (g) of the Act. (*See* Pet. Br. at 27-34).

There are sound policy reasons why Congress would not have intended in § 301(l) to bar FDF variances for toxic pollutants. By 1977, Congress was fully aware of the enormity of the tasks that it had assigned to EPA in the Clean Water Act. It knew that numerous EPA regulations had been set aside by courts and remanded to the Agency. It would have made no sense for Congress to have prohibited EPA from maintaining a safety valve to help protect its regulations from challenge, especially when that safety valve had been used only sparingly and thus was not, as NRDC claims, a gaping loophole in the implementation of the statute's requirements.

[11] NRDC's argument that Congress was not concerned about BPT controls because BPT was only an "interim" measure (NRDC Br. at 27) is unpersuasive. These "interim" BPT controls were to be in effect for seven years – until 1984 when BAT would be implemented. Congress thus would have had reason to be concerned about BPT controls.

Moreover, contrary to what NRDC implies (NRDC Br. at 10), the task of promulgating defensible limitations and standards has not gotten markedly easier over the years.[12] It is still not possible for EPA to gather, evaluate, and address all relevant data in the development of all industry-wide regulations. (*See* EPA Br. at 4-6, 37.) The FDF variance mechanism is thus still an essential and limited safety valve.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit prohibiting FDF variances for toxic pollutants should be reversed.

Respectfully submitted,

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[12] EPA is under court-ordered deadlines to promulgate effluent limitations guidelines and standards regulations (*see* n.1, *supra*) but is still unable to meet those deadlines due to the complexity and enormity of the task of promulgating such regulations. As a result, EPA has been compelled continually to seek from the court extensions of the deadlines for promulgating the regulations, as reflected in the numerous modifications of the court's order. *See* note 1, *supra*.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1013

CHEMICAL MANUFACTURERS ASSOCIATION, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

No. 83-1373

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

I.

In our opening brief (at 18-23), we argued that EPA is authorized under the Clean Water Act to grant "fundamentally different factors" (FDF) variances from the pretreatment standards applicable to indirect dischargers, as well as from the currently practicable BPT and the potentially more stringent BAT limitations that govern direct dischargers. Respondent answers, first, that this broad question is not before the Court and that the only

point in dispute is the meaning of Section 301(*l*) of the Act, 33 U.S.C. 1311(*l*). In the remainder of its brief, however, respondent repeatedly relies on the assertion that FDF variances are proper only in the case of BPT limitations. Resp. Br. 11-14, 24, 26-27, 34. As we explained in our opening brief (at 18-23), respondent's position is wrong and is contrary to *E.I. duPont de Nemours* v. *Train*, 430 U.S. 112 (1977), and *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 72 (1980).

Contending that *duPont* and *National Crushed Stone* sanctioned FDF variances only in the case of BPT limitations, respondent maintains (Br. 12) that FDF variances are proper in that context because Congress did not create an applicable statutory variance. By contrast, respondent contends (Br. 12), FDF variances may not be granted from BAT limitations because "Congress created its own BAT variance in Section 301(c) of the Act • • • and deemed this the sole deviation from otherwise uniform national standards."

If anything, this argument supports our position, rather than respondent's. Respondent appears to have forgotten that Section 301(c) modifications are not available for indirect dischargers.[1] Section 301(c) authorizes modifications of "the requirements of subsection (b)(2)(A) of this section with respect to any point source *for which a permit application is filed* after July 1, 1977 • • •" (emphasis added). Indirect dischargers are not subject to the permit program established under the Act; only direct dischargers apply for and obtain such permits.[2] Section

[1] Respondent incorrectly states (Br. 29 & n.41) that EPA has made Section 301(c) modifications available for pretreatment standards. The cited regulation dealt with BAT direct discharger requirements, not pretreatment standards. 40 Fed. Reg. 55770, 55776 (1975).

[2] Section 402 of the Act, 33 U.S.C. 1342, established the "National Pollutant Discharge Elimination System" (NPDES) permit program only for direct dischargers, including publicly owned treatment works (POTWs) to which indirect dischargers send their waste water. Effluent limitations guidelines are applied to direct dischargers through this permit program. *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). Pretreatment standards, by contrast, apply directly to the indirect discharger without the issuance of any permit. See Pet. App. A17.

301(c) is therefore inapplicable on its face to indirect dischargers. Consequently, even if respondent were correct that FDF variances may not be granted from BAT *direct* discharger requirements due to the availability of Section 301(c) modifications,[3] that would not support respondent's argument that FDF variances may not be granted to indirect dischargers. On the contrary, FDF variances with respect to the pretreatment standards for indirect dischargers would be just as appropriate as FDF variances with respect to BPT limitations—a practice that respondent concedes was approved in *duPont*.[4]

Respondent relies (Br. 13-14) on *duPont's* holding that FDF variances may not be granted from new source direct discharger requirements. Respondent contends that the reasons for this holding apply equally to pretreatment standards for existing sources. With two exceptions discussed below, all of respondent's arguments (Br. in Opp. 13) in this regard were addressed in our opening brief (at 20, 21 n.15, 22), and we will not repeat those points here. Respondent argues that both pretreatment standards and new source standards for direct dischargers, unlike BPT limitations, are intended to ensure national uniformity and maximum feasible control" and to "force technology to the level of the best possible performer." Resp. Br. 13 & n.18. However,

[3] As previously noted, we disagree with this argument.

[4] Respondent incorrectly asserts (Br. 24) that *duPont* "upheld" BAT rules that did not contain an FDF variance clause. In fact, the validity of the BAT regulations was not at issue in *duPont*.

Respondent also suggests (Br. 24) that in *duPont* this Court "appropriately assumed" that only Section 301(c) modifications, and not FDF variances, would be available for BAT regulations. Respondent does not, and cannot, point to anything in the opinion to support such a reading.

respondent's suggestion that BPT limitations are not intended to promote uniformity conflicts with *duPont's* holding (and with respondent's own decade-long insistence) that BPT no less than BAT requirements are to be established through national categorical regulations. The FDF variance does not conflict with the goal of uniformity in the BAT or pretreatment context any more than it does in the BPT context, where it has been explicitly upheld by this Court.

Respondent's reliance on the technology-forcing purposes of pretreatment, BAT, and new source requirements likewise is invalid. It is true that these requirements reflect the technological capabilities of the best performers *within each subcategory*. But, as we have explained (Gov't Br. 10-11, 30-31), the granting of an FDF variance signifies that the plant or plants in question constitute a separate subcategory and hence that the requirements for these plants are not properly determined by reference to the "best performer" in some other subcategory of the industry in question.[5] Consequently, granting FDF variances is not at odds with Congress's intent to improve the technology for industrial categories and subcategories.

Respondent draws an analogy (Br. 13-14) between new source direct dischargers (which may not obtain FDF variances) and all indirect dischargers. The more appropriate comparison is between new source direct and indirect dischargers (neither of which may obtain FDF variances) or between existing direct and indirect dischargers (both of which, in our view, are eligible for FDF variances). A new plant, whether a direct or in-

[5] Respondent also ignores the fact that, for many industries—as a result of a consent decree authored in relevant part by respondent—EPA is required to promulgate *BPT*-level pretreatment standards as an interim measure pending development of potentially more technology-forcing BAT-level standards. See *NRDC* v. *Train*, 8 Env't Rep. Cas. (BNA) 2120, 2128 (D.D.C. 1976). The electroplating pretreatment standards unsuccessfully challenged below were one such regulation.

direct discharger, can be designed to conform to the national rule and thus has no need for the FDF variance. See Gov't Br. 22-23. By contrast, an existing source, whether direct or indirect, does not have this flexibility, and the availability of FDF variances is therefore useful and important. *Ibid.*

II.

A. Respondent next turns to the meaning of Section 301(*l*) of the Act, but respondent ignores the cardinal principle of statutory construction articulated by this Court in a similar context just last Term (*Chevron U.S.A., Inc.* v. *NRDC*, No. 82-1005, (June 25, 1984), slip op. 4-5 (footnotes omitted):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Here, respondent certainly cannot show that its interpretation of Section 301(*l*) is supported by Congress's clear intent as evidenced by either the statutory language or the legislative history. Nor can respondent demonstrate that EPA's interpretation is impermissible. Accordingly, EPA's interpretation of the Act it administers must prevail.

B. Respondent begins (Br. 14-20) by contending that the plain language of Section 301(*l*) prohibits FDF var-

iances for toxic pollutants and that it is therefore unnecessary to look any further. Respondent's argument clearly lacks merit.

Section 301(*l*) provides that EPA may not "modify" any pretreatment standard or other requirement of Section 301 with respect to any toxic pollutant. In our opening brief (at 24-27), we pointed out that the statutory term "modify" may not be given its broad, literal meaning, *i.e.*, to change or alter, because Congress could not have intended to prohibit EPA from amending its regulations as warranted, and because such an interpretation would bring Section 301(*l*) into conflict with Section 307(b)(2), 33 U.S.C. 1317(b)(2), which commands EPA to "revise" its standards, including those for toxic pollutants (see 33 U.S.C. 1317(b)(1)), on a periodic basis.[6]

Respondent answers our argument (Br. 14-16) by maintaining that the term "modify" as used in Section 301(*l*)—unlike in other provisions of the Act (Br. 15)—signifies only a change in one direction: to "make more temperate and less extreme: lessen the severity of: moderate." Respondent seems to suggest that application of this definition gives Section 301(*l*) a reasonable meaning and eliminates any conflict with Section 307(b)(2). Respondent is wrong.

Under respondent's interpretation, Section 301(*l*) would still place severe and unlikely restrictions on EPA's ability to amend its own rules. Once EPA promulgated a limitation or standard for a toxic pollutant, EPA could not amend its rules to make that requirement "more temperate or less extreme." As we noted in our opening brief (at 25), neither the discovery of an error in the Agency's previous analysis, the compilation of better or more accurate data, nor subsequent scientific developments would

[6] EPA has not changed its position, regarding the interpretation of Section 301(*l*), as respondent contends (Br. 15). The Agency's position has always been straightforward—that an FDF variance is not a "modification" as Congress used that term in Section 301(*l*).

allow the Agency to change the standard. Unless Congress acted, the requirement could never be relaxed. Since Congress entrusted the EPA with the responsibility for issuing the requirements for toxic pollutants in the first place, it seems most unlikely that Congress intended to restrict EPA's customary rulemaking authority in this way.

Thus, respondent's definition of the term "modify" fails to eliminate the conflict between Sections 301(*l*) and 307(b)(2), since the periodic revisions required by the latter provision may well result in the relaxation of requirements shown by subsequent research or experience to have been unreasonably stringent. Needless to say, when two statutory provisions are facially conflicting, it can hardly be argued that the statutory language is plain and that extrinsic aids to construction may not be consulted.

Furthermore, respondent points to nothing in the language of Section 301(*l*) that shows which of the two concededly accepted meanings of the term "modify" Congress intended to adopt. Losing sight of the fact that it is attempting to advance a "plain meaning" argument, respondent finds it necessary to rely on other provisions of the Act (Br. 17, 19) and even the legislative history (Br. 16) to show what Section 301(*l*) means. Obviously this is no "plain meaning" argument at all.[7]

[7] It is also interesting to note that respondent's definition does not support the court of appeals' holding that EPA may not issue any FDF variances for toxic pollutants. An FDF variance can result in a requirement that is *more* stringent than the national standard, if the facility's fundamentally different factors so warrant. 40 C.F.R. 403.13(b) (Pet. App. A122). Respondent calls this argument "disingenuous" (Br. 14 n.19) because no applicant has requested more stringent requirements. The point is, however, that respondent and any other interested person could initiate the FDF variance process to seek a more stringent requirement. That respondent has never seen fit to invoke the regulation for this purpose proves nothing.

Respondent appears to shrink from the unavoidable implications of its own construction of Section 301(*l*). It is noteworthy that respondent refrains from arguing that Section 301(*l*) prohibits the amendment of categorical limitations or standards for toxic pollutants. Instead, respondent states (Br. 17; emphasis added) that Section 301(*l*) means that EPA "cannot • • • make these national standards less stringent *for individual plants*, at least where toxics are concerned." Where in the plain language of Section 301(*l*) does respondent discern this distinction between modifications that affect a broad category of plants and those that affect only a smaller class?[8]

III.

A. Because the statutory language does not answer the question presented by this case, we turn to the legislative history. The relevant legislative history is sparse, but it clearly provides far more support for EPA's interpretation of Section 301(*l*) than for respondent's. There are three relevant aspects of the legislative history: (1) the evolution of Section 301(*l*), (2) what Congress said about this provision, and (3) the inference that may be drawn from what Congress did not say in light of the then existing state of the law and EPA's established practices.

1. The origin and evolution of Section 301(*l*) are set out in Chemical Manufacturers Association's (CMA's) opening brief (at 29-30). In short, what is now Section

[8] Furthermore, respondent's argument that EPA may not make any plant-specific modifications, cannot be squared with respondent's own recognition that EPA may establish *subcategories* of one or a few plants. Resp. Br. 41 & n.63; Transcript of Oral Argument in court of appeals 252. EPA thus has the authority to promulgate national pretreatment standards in the first instance for a subcategory of one plant, and it has commensurate authority under Section 307(b)(2) to "revise" a national pretreatment standard for such a subcategory.

301(*l*) was first proposed in 1977 as a provision of Section 301(c) that prohibited the granting of Section 301(c) modifications for toxic pollutants. When Congress decided to add Section 301(g), which authorizes the granting of water quality modifications, a virtually identical provision banning such modifications for toxic pollutants was included in that section. The Conference Committee deleted the prohibitions in Section 301(c) and (g) and consolidated them into a single provision, Section 301(*l*). The Conference Committee did not explain the reason for this amendment, but Representative Roberts, the House floor manager stated:

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, *specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.*

Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *Legislative History of the Clean Water Act of 1977*, 328-329 (Comm. Print 1978) (emphasis added) [hereinafter *Leg. Hist.*].

Putting aside for the moment what Representative Roberts said, we think that the evolution of Section 301(*l*) supports EPA's interpretation of that provision rather than respondent's. In our view, the prohibitions originally included in Section 301(c) and (g) were consolidated into a separate Section 301(*l*) for stylistic purposes.[9] For this reason, the Conference Committee had no cause to explain the change.

[9] When the Conference Committee created Section 301(*l*) by consolidating the prohibitions previously included in Section 301(c) and (g), the Committee added a clause to Section 301(g) prohibiting water quality modifications for conventional pollutants and thermal discharges, as well as for toxic pollutants. See CMA Br. 30 n.38. Because this clause is broader than Section 301(*l*), which

Respondent argues (Br. 19), however, that the conferees created Section 301(*l*) because they wanted to make a substantive change not contained in the bill passed by either House. According to respondent, Section 301(*l*) was created to prohibit other modifications in addition to those available under Section 301(c) and (g). But if the conferees intended to make such a substantive change, one would expect them to have provided notice to their colleagues and some explanation of their action. None, however, was provided.

There is another glaring defect in respondent's interpretation of the drafting process. If the Conference Committee intended for Section 301(*l*) to apply to modifications in addition to those available under Section 301(c) and (g), the Committee must have had some other type or types of modifications specifically in mind. But according to respondent (Br. 21), "Congress did not believe other variances [*i.e.*, other than Section 301 (c) and (g) modifications] were authorized."[10] What, then, does respondent think the conferees sought to accomplish?

We of course submit that Congress was well aware of EPA's practice of granting FDF variances, especially since that practice had been prominently discussed and approved in *duPont*. And as previously noted, if the conferees had intended to restrict the issuance of such variances, some reference to FDF variances would most likely have been made. None was.

2. EPA's interpretation is also supported by Congress's discussion of Section 301(*l*). Like the remarks of Representative Roberts previously noted, the legisla-

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applies only to toxic pollutants, it is not redundant, as respondent claims (Br. 20 n.31).

[10] Respondent elaborates that at the time of the 1977 amendments, Congress did not "focus" on BPT limitations (Br. 27) and had no way of anticipating that EPA would issue FDF variances for pretreatment and BAT standards (Br. 24-30).

tive history cited by respondent only confirms the accuracy of EPA's interpretation. For example, the quoted statement of Senator Muskie—that "there are no potential waivers or modifications" (Resp. Br. 21)—was made specifically in the context of discussing Section 301(c) and (g). *Leg. Hist.* 458. Similarly, the Senate Report excerpt quoted by respondent (Br. 21), which states that "the [Senate] bill prohibits variances for [toxic] pollutants," comes specifically in a discussion of the Senate version of what became Section 301(g). See *Leg. Hist.* 673-677 (discussing water-quality based modifications).

The only other portions of the legislative history claimed by respondent to support its position are references to Section 301(c) and (g) as "variance" provisions (see Br. 16 & n.21). Contrary to respondent's suggestion (Br. 16-17), we do not dispute the authoritativeness of these pronouncements. What we contest is their bearing on the issue in this case. Although not spelled out, respondent's argument is based on the following chain of reasoning:

1. Section 301(*l*) prohibits "modifi[cations]" for toxic pollutants.
2. Section 301(c) and (g), which authorize "modifi[cations]," were described by Congress as "variance" provisions.
3. An FDF variance is obviously a "variance."
4. Therefore, Section 301(*l*) prohibits FDF variances.

It is not necessary to be a logician to see what is wrong with this reasoning. If A includes B, and B resembles C, it does *not* follow that A also includes C. Here, just because a Section 301(c) or (g) modification may be described as a variance, it does not follow that an altogether different sort of variance (*i.e.*, an FDF variance) is a "modification" in the legal sense intended

by Section 301(*l*). The fallacious reasoning used by respondent can be employed to "prove" any number of untruths—for example, that EPA is required by Section 307(b)(2) to issue Section 301(c) and (g) modifications and FDF variances on a periodic basis:

1. Section 307(b)(2) requires EPA to "revise" its requirements as developments warrant.
2. A revision may be described as a "correction" or "alteration." *Webster's Third New International Dictionary* 1944 (1976 ed.) *Random House Dictionary of the English Language* 1227 (unabr. ed. 1967).
3. Section 301(c) and (g) modifications and FDF "variances" may be described as "corrections" or "alterations."
4. Therefore, Section 307(b)(2) requires EPA periodically to issue Section 301(c) and (g) modifications and FDF variances.[11]

3. The remaining question with respect to the legislative history is what may be inferred from the undisputed fact that Congress never mentioned FDF variances during its consideration of Section 301(*l*). We think that Congress must have been aware of and understood EPA's practice of granting FDF variances and

[11] The present Congress did not reject the concept of FDF variances for toxic pollutants, as respondent suggests (Br. 26 n.37). The Senate bill amending the Clean Water Act was reported out of committee on the day after the court of appeals' decision (see Resp. Br. 26 n.37) and thus naturally did not contain a provision to overrule that decision. In the House, EPA did advert to the need to overrule that decision, but no bill to that effect was proposed. This history does not show that the present Congress endorsed the court of appeals' decision. And in any event, " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983), quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960).

that Congress's failure to mention those variances in connection with Section 301(*l*) suggests that Congress did not intend to affect that practice.

Respondent contends (Br. 21) that Congress had no reason to mention FDF variances as among those modifications to be prohibited by Section 301(*l*) because "Congress did not believe other variances [besides section 301(c) and (g) modifications] were authorized, 1972 *Leg. Hist.* 172, 309, and EPA had not yet promulgated an FDF variance for either pretreatment or BAT standards." Respondent's reliance on 1972 legislative history is clearly misplaced. It is Congress's intent *in 1977*, not 1972, that is at issue here. By the time Congress took up the 1977 amendments to the Act, EPA had regularly promulgated FDF variances as part of national BPT effluent limitations. Moreover, these FDF variances were always made available for pollutants that Congress designated as toxic in 1977. And variances for such pollutants had been granted.[12] That EPA had not yet incorporated the FDF variance into BAT effluent limitations or pretreatment standards is beside the point,[13] because the issue is whether Section 301(*l*) bars FDF variances for *all* requirements of Section 301.

[12] See EPA Br. 30.

[13] During the first five years after initial passage of the 1972 Act, EPA's main objective was to issue the first tier of national technology-based regulations, which established BPT requirements for categories of dischargers. These regulations covered discharges of both toxic and non-toxic pollutants, and FDF variances were available regardless of the type of pollutant. Prior to 1977, the FDF variance was not yet included in BAT regulations or pretreatment standards because the Agency had not yet turned its full efforts and refined its approach to those requirements. When it did so after enactment of the 1977 amendments, it recognized that FDF variances were equally appropriate for these regulations. The fact that the Agency's thinking evolved only confirms that the Administrator has broad leeway to construe the statute. *Chevron*, slip op. 25.

Congress also must have been aware of this Court's opinion in *duPont*, which discussed and approved EPA's practice of granting FDF variances. Respondent suggests (Br. 26-27) that Congress was not familiar with the discussion in *duPont*, but in respondent's own words, *duPont* was a "pivotal" case in the history of the Clean Water Act. It had just been decided. And the discussion of FDF variances was closely related to the Court's holding. We doubt that this discussion could have escaped the attention of a Congress that was then in the process of amending the Act.

Respondent argues that *duPont* approved FDF variances only with respect to BPT limits. For reasons already discussed (see Gov't Br. 20-23; pages 1-5, *supra*), we disagree. But in any event, since Section 301(*l*) applies to BPT limitations, as well as all other requirements of Section 301, respondent's argument is beside the point.

Respondent contends, however, that Congress did not "focus[]" on BPT limitations when it enacted Section 301 (*l*) (Br. 27). But Section 301(*l*) indisputably applies to BPT limitations; and in 1977, those limitations were scheduled to remain in effect *for the next seven years*. Respondent is accusing Congress of a major and implausible oversight.

In sum, we think that Congress was aware of EPA's practice of granting FDF variances and that if Congress had intended to restrict that practice it would have said so. Congressional intent to overturn established law should not be inferred in the absence of an express indication.[14] *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979).[15]

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[14] The pre-existing law in *Edmonds* does not appear to have been as well-settled as respondent would like to believe. See *Edmonds*, 443 U.S. at 275 (Blackmun, J., dissenting).

[15] *Zuber* v. *Allen*, 396 U.S. 168 (1969), relied on by respondent (Br. 25), supports EPA. There, the Court held that the Secretary of Agriculture had exceeded his authority in issuing milk pricing orders that included an adjustment based on a milk producer's location. The Court concluded (396 U.S. at 180-181) that such location differentials were fundamentally inconsistent with the statute's "plain thrust" and conflicted with Congress's intent as expressed in the legislative history. In that context, the Court concluded that "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route" (*id.* at 185) and that Congress's failure in ensuing years to reverse the Secretary's practice could not be construed as an endorsement (*id.* at 185-186 n.21).

Our position in this case is fully consistent with *Zuber*. The FDF variance does not conflict with either the "plain thrust" of the Clean Water Act or with the legislative history. More fundamentally, however, in *Zuber*, as well as in *TVA* v. *Hill*, 437 U.S. 153 (1978), on which respondent also relies (Br. 9, 23, 26), this Court refused to infer congressional *approval* of a particular agency practice in the absence of an express indication of such an intent. But here, respondent asks the Court to infer the opposite—a congressional intent to *disapprove* a longstanding agency practice, in the absence of any specific disapproval of that practice, and even though the statutory language is not clear on its face. Even if Congress did not specifically *embrace* the FDF variance, there is certainly no evidence that Congress sought to *invalidate* that variance as to toxic pollutants. Particularly where, as here, the pre-existing administrative practice is not at odds with the underlying structure and purpose of the Act, such an intent on the part of Congress should not be inferred.

IV.

The remainder of respondent's brief (at 30-43) is devoted to arguing that EPA's practice of granting FDF variances is not sound policy and that EPA's objectives can be better achieved by alternative means. We disagree with respondent's analysis. But, in any event, the issue in this case is not whether, in the Court's view, EPA has adopted the best practice. *Chevron*, slip op. 26-28. Rather, the issue is whether EPA's interpretation of the Act is permissible, and on that question respondent's argument falls far short. Despite its rhetoric, respondent's disagreement with the Agency is really quite narrow. There is no dispute that in setting pretreatment standards and other requirements of Section

301 EPA is justified in making special allowance for those facilities that face factors fundamentally different from other facilities in the industry. EPA has chosen to deal with this problem by attempting to issue categorical requirements as quickly as possible, while permitting atypical facilities to seek FDF variances at a later date. Respondent, on the other hand, while contesting the issuance of FDF variances, does not dispute EPA's authority to create special subcategories for an atypical plant or plants. On the contrary, respondent observes (Br. 41; emphasis added) with apparent approval that "requests to establish separate subcategories for *one or a few* plants which are somehow 'different' from others in the same category are a common feature of [EPA] rulemakings." Nor does respondent dispute EPA's authority to amend its rules after issuance to create such subcategories. In other words, respondent disagrees, not with the substance of what EPA is doing, but with the procedure. But if deference to an administrative agency's expertise and construction of the statute it administers means anything, it must mean that the agency is permitted to make such procedural choices absent a clear expression of contrary congressional intent. Particularly in view of the small number of FDF variances that are sought and granted, there was no justification for the court of appeals' interference with the procedure chosen by the Agency to achieve a concededly valid end.

Arguing that the FDF variance procedure conflicts with Congress's broad intent in enacting the 1977 amendments, respondent emphasizes that the 1977 amendments reflect a congressional intent to achieve control of toxic pollutants through national categorical regulations that are "as uniform *as possible*" (Br. 22, 23, 32-33 (emphasis added)). The FDF variance, however, is fully consistent with this goal, because Congress recognized that EPA must be allowed to take into account the diversity within each industry by establishing appropriate subcategories (*Leg. Hist.* 455). The categorical approach to setting standards necessarily means that some individual plants within a category must incur costs greater than other plants *in that category* (See Resp. Br. 34). But the point of the FDF variance is to allow a recategorization of those plants that must incur costs wholly disproportionate to the *range of costs considered by EPA* during the rulemaking for that category.[16] Moreover, the FDF variance mechanism does not give EPA "carte blanche" to establish case-by-case requirements "without limit" (Resp. Br. 32). FDF variances may be granted only under very narrowly circumscribed conditions—conditions that would have warranted creation of a separate subcategory in the first place. And contrary to respondent's contention (Br. 32), an FDF variance application is not considered in isolation from the larger category or subcategory in which the plant was originally classified. Instead, the Agency compares the plant in question to the category as a whole to determine if the plant's factors are "fundamentally different" from those considered by the Agency.[17]

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[16] For example, if during the rulemaking EPA finds that the maximum cost to be incurred by a plant in a subcategory is $1 million, then any plant in that category clearly can be required to incur such costs even if other plants may need to spend much less to comply. But a plant that must spend $5 million to meet the requirement because it is fundamentally different from those considered by the Agency in establishing the rule may be entitled to argue that it should be treated as a separate subcategory.

[17] Nor has EPA improperly incorporated BPT criteria into variance decisions regarding BAT, as respondent claims (Br. 34-35). The Act clearly requires the Agency to consider costs in establishing BAT effluent limitations (33 U.S.C. 1314(b)(2)(B)) and thus an individual plant's costs—as oposed to its ability to afford those costs—is also an appropriate factor in determining whether to grant an FDF variance. In any event, the issue in this case is not the content of any specific variance, but EPA's authority to promulgate any FDF variance for pretreatment standards. See *duPont*, 430 U.S. at 128 n.19.

Respondent also contends that the procedures for granting FDF variances differ from those followed when subcategories are created during initial rulemaking or subsequent revisions. The latter procedures are clearly more to respondent's liking. Resp. Br. 36-37. But the issue in this case is the meaning of Section 301(*l*), and there is *no* basis for contending that the purpose of that provision was to regulate the *procedures* by which EPA can accomplish the same permissible end. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

Respondent, echoing the court of appeals, claims that it "makes no sense" to conclude that Congress intended to prohibit Section 301(c) modifications but not to prohibit FDF variances. Resp. Br. 31-32. The fact is, however, that Section 301(c) modifications and FDF variances do *not* serve the same function. A Section 301(c) modification is available to a facility able to show that the national categorical standard would cause it severe economic hardship and that the facility meets the other statutory prerequisites. A Section 301(c) modification may be granted even though EPA took into account all of the appropriate factors in establishing the national standard. The FDF variance, by contrast, rectifies EPA's oversight or omission in establishing the national rule and has nothing to do with a plant's ability to afford compliance. If Section 301(c) modifications and FDF variances *were* indistinguishable, it would have been pointless for this Court to *approve* FDF variances for BPT requirements in *duPont*, yet disallow modifications to BPT requirements based on Section 301(c) factors in *National Crushed Stone*.[18] Therefore, simply be-

[18] Contrary to the interpretation of both respondent (Resp. Br. 31) and the court of appeals (Pet. App. A42), this Court did *not* conclude in *National Crushed Stone Ass'n* that Section 301(c) modifications and FDF variances "serve the same function." See Gov't Br. 33 n.25.

cause Section 301(*l*) prohibits Section 301(c) modifications for toxic pollutants, it does not follow that FDF variances are also prohibited. See Gov't Br. 30-33.

Finally, the FDF variance mechanism does not thwart Congress's desire that national technology-based controls for categories of industries be established as expeditiously as possible. On balance, the FDF variance mechanism advances that goal by helping the Agency to establish sound national categorical regulations that are less subject to attack on the ground that an atypical plant or plants were not adequately considered. Respondent has the luxury of calling the FDF variance "nothing more than a fig leaf for inadequate agency rulemaking" (Br. 38), because it is EPA, not respondent, that is faced with the difficult task of implementing and construing the Clean Water Act. Respondent's bald assertion that the FDF variance makes national rules *more* vulnerable to challenge (Br. 38) is difficult to understand. The FDF variance has in fact helped to protect against precisely this risk (see, *e.g.*, *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979)), and respondent cannot cite one case arising under the Clean Water Act to support its contrary contention. The FDF variance does not put all of EPA's "eggs in [one] basket" (Br. 38); the FDF variance mechanism constitutes an infrequently used but nevertheless important safeguard that courts have relied on in rejecting challenges to national rules. The Agency has promulgated categorical regulations covering tens of thousands of industrial dischargers, and the fact that a handful of individual plants make use of the FDF variance process does not constitute a threat to the goals of the Act.[19] EPA's interpretation of the Act it adminis-

[19] Respondent cites (Br. 43) an excerpt from the Conference Report reflecting congressional concern that steam electric power plants had been abusing a provision found in an entirely separate section of the Act, § 316, 33 U.S.C. 1326, with respect to the discharge of heat. This is utterly irrelevant to the proper construction of Section 301(*l*), which does not even apply to Section 316.

ters is a "permissible" one (*Chevron*, slip op. 5) and should be sustained.

For the foregoing reasons and those set forth in our opening brief, the opinion of the court of appeals should be reversed.

Respectfully submitted.

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